84-1563

No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

BLINDER, ROBINSON & CO. INC.
and MEYER BLINDER,
Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION,
THE UNITED STATES OF AMERICA, and
UNNAMED OFFICERS and AGENTS,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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April 2, 1985

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QUESTIONS PRESENTED

1. Can a federal administrative agency circumvent this Court's holding in *Haring v. Prosise* and avoid adjudication of violations of petitioners' Fourth Amendment rights by withdrawing a stale and defective agency investigative order *after* using the illegally obtained evidence in an enforcement proceeding against petitioners?

2. Did an administrative investigation by the Enforcement Staff of the Securities and Exchange Commission violate petitioners' Fourth Amendment rights and the federal securities statutes when the investigation was conducted pursuant to compulsion of an SEC "formal order" whose scope was unlimited as to specific subject matter or time, and which was issued more than a year before commencement of the business activities eventually investigated?

3. Did petitioners have a due process right to an evidentiary hearing on an apparent conflict of interest of counsel on petitioners' motion to set aside a judgment in a government law enforcement action?

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SECURITIES AND EXCHANGE COMMISSION,
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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioners Blinder, Robinson & Co., Inc., and Meyer Blinder pray that a Writ of Certiorari issue to review two judgments of the United States Court of Appeals for the Tenth Circuit entered in these consolidated cases.

OPINIONS BELOW

The United States Court of Appeals for the Tenth Circuit affirmed the dismissal of an action by petitioners against respondents seeking, *inter alia*, injunctive relief against unlawful investigatory activities, and damages for the injuries caused thereby. In a related case in which respondent Securities and Exchange Commission ("SEC") had used illegally obtained evidence to obtain an anti-fraud injunction against petitioners, the court of

appeals affirmed the denial of petitioners' motion under Fed. R. Civ P. 60(b) for a new trial based on inexcusable neglect and an apparent conflict of interest of petitioners' counsel. The court of appeals' decision embracing both cases, which is reported at 748 F.2d 1415, is set forth in the Appendix ("App.") at 1a-11a.[1] The district court's Memorandum and Order for Summary Judgment of Dismissal of petitioners' injunctive and damages action, which is reported at 565 F. Supp. 74, is set forth at App. 12a-18a. The district court's Order Denying the Rule 60(b) Motion, which is unreported, is set forth at App. 19a.[2]

JURISDICTION

The judgments of the court of appeals were entered on November 27, 1984. Rehearing was denied on January 2, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of Amendments IV, V, and VI to the United States Constitution, the Securities Act of 1933 ("1933 Act"), 15 U.S.C. §§ 77a *et seq.*, the Securities Exchange Act of 1934 ("1934 Act"), 15 U.S.C. §§ 78a *et seq.*, and Rule 60(b) of the Federal Rules of Civil Procedure, are set forth at App. 38a-39a.

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[1] Petitioners' action for injunctive relief and damages was considered in No. 83-2041 below. Petitioners' Rule 60(b) motion was considered in No. 84-1483 below.

[2] Other relevant opinions in these related cases include the district court's imposition of an anti-fraud injunction against petitioners, 542 F. Supp. 468 (D. Colo. 1982); the Tenth Circuit's affirmance of the injunction, CCH Fed. Sec. L. Rep. ¶ 99,491 (10th Cir. Sept. 19, 1983); and the Tenth Circuit's original finding that petitioners' claims against respondents were not moot, 692 F.2d 102 (10th Cir. 1982).

STATEMENT OF THE CASE

Introduction

This petition raises important Fourth and Fifth Amendment issues in the context of federal administrative agency enforcement proceedings. These constitutional issues arise in two consolidated cases involving an illegal investigation by the SEC of petitioners' broker-dealer underwriting business. The SEC Enforcement Staff obtained evidence through compulsion of an administrative investigative order which was unreasonable in scope when issued and outdated when used. Petitioners timely raised their Fourth Amendment objections both in the administrative investigation and in a suit to enjoin the investigation and for damages. The court of appeals dismissed their claims based on the illegal investigation by finding the issue moot after petitioners were severely sanctioned by imposition of an anti-fraud injunction against them based upon the illegally gathered evidence. As a result, petitioners have been completely denied their right to an adjudication of their cause of action alleging a violation of their Fourth Amendment rights. In addition, petitioners were denied due process in the enforcement action because of the failure of the courts below to allow an evidentiary hearing on their motion for a new trial which, among other things, raised a serious apparent conflict of interest of their counsel.

The dismissal of petitioners' constitutional claims (No. 83-2041) raises the issue whether the court of appeals erred by holding that, notwithstanding that evidence obtained under the auspices of the illegal "formal order" was used in enforcement actions by the SEC, the SEC mooted petitioners' claims of illegality in a separate civil action for damages and injunctive relief by withdrawing the illegal order. This holding would, in effect, allow the SEC to circumvent this Court's holding in *Haring v. Prosise*, 462 U.S. 306 (1983), that illegal searches

can be challenged in parallel civil actions notwithstanding the failure of a defendant to raise the illegality as a defense to a criminal law enforcement proceeding. The SEC will have circumvented *Haring* by (i) issuing in August 1978 an overly broad, defective formal order of investigation which was utilized in early 1980 by its Enforcement Staff to conduct an unlawful investigation of petitioners' business activities in violation of petitioners' Fourth Amendment rights; (ii) allowing its Enforcement Staff to utilize the fruits of the unlawful investigation to obtain an anti-fraud injunction and to attempt to impose severe administrative disciplinary sanctions against petitioners; and (iii) depriving petitioners of their *Haring* right to have the Fourth Amendment violations adjudicated in a separate proceeding by terminating the formal order after gathering and using the tainted evidence but before any evidentiary hearing was ever held on the Fourth Amendment issue.

The summary denial of petitioners' Rule 60(b) motion in the civil injunctive action (No. 84-1483) raises the issue whether petitioners' Fourth and Fifth Amendment rights to adequate assistance of counsel and to a fair adjudication of a government law enforcement proceeding were violated by the courts' failure to allow an evidentiary hearing on claims of inexcusable neglect and an apparent serious conflict of interest in which the personal business interests of petitioners' counsel may have been fostered by petitioners' loss in court. The lack of an evidentiary hearing on this issue precluded any determination whether the apparent conflict undermined petitioners' defense, and whether it was the cause of counsel's failure to pursue the illegality of the SEC investigation as a defense in the injunctive proceeding, or to raise that issue at all stages on appeal.

Facts

On August 3, 1978, the Securities and Exchange Commission issued a Formal Order of Investigation (the

"formal order")[3] authorizing the SEC Enforcement Staff to investigate the activities of petitioners Blinder, Robinson & Co., Inc., and Meyer Blinder (referred to jointly herein as "Blinder, Robinson").[4] The formal order is the official document entered by the SEC pursuant to the 1933 and 1934 Acts that formally delegates authority to the SEC Enforcement Staff to issue subpoenas, administer oaths, and take sworn investigative testimony concerning conduct specified in the order to determine

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[3] The formal order appears at App. 20a-22a. The SEC stated in the formal order that (as of August 3, 1978) it had information that tended to show that Blinder, Robinson (in the past) had made misstatements and omissions regarding new issues that the firm had been offering to sell or purchase. The formal order conferred on SEC staff members the authority to gather evidence in the course of investigating whether Blinder, Robinson had engaged *or was about to engage* in certain illegal conduct. *See SEC v. Jerry T. O'Brien*, 104 S. Ct. 2720, 2723 n.1 (1984) (purposes of formal order are to define scope of ensuing investigation and establish limits within which staff may resort to compulsory process); *see also* Mathews, *Effective Defense of SEC Investigations: Laying the Foundation for Successful Disposition of Subsequent Civil, Administrative and Criminal Proceedings*, 24 Emory L.J. 567, 584 (1975); *SEC v. Brigadoon Scotch Distributing Co.*, 480 F.2d 1047, 1050 n.1 (2d Cir. 1973), *cert. denied*, 415 U.S. 915 (1974).

[4] Blinder, Robinson is a national broker-dealer firm headquartered in the suburbs of Denver, Colorado. It has 28 offices in nine states, and approximately 125,000 active customer accounts. Blinder, Robinson deals principally in the "over-the-counter" securities markets. Since 1977, it has been one of the most active underwriters of low-priced, speculative, new issues for start-up or relatively small, unseasoned companies in the so-called Denver "Penny Stock" market. A "penny stock" issue is one in which the company's shares are priced below $1.00 per share, indeed, often as low as 1¢ to 10¢ per share.

In 1978, Blinder, Robinson underwrote four issues, all penny stock issues, none of which was priced above 50¢ per share. The SEC formal order of investigation issued in August 1978 was directed at the firm's activities in "new issues of securities of highly speculative, recently organized issuers," i.e., the penny stock issues the firm had been underwriting.

whether violations of the federal securities laws have occurred. The formal order in this case was extraordinarily broad. Unlike most formal orders in SEC enforcement cases, it addressed no specific time period, and designated no specific transactions to be investigated. In short, the formal order (and resulting subpoenas) was a broad warrant which the SEC Enforcement Staff viewed as authorization to undertake an investigation, with administrative subpoena power, of a virtually unlimited range of conduct by Blinder, Robinson over an open-ended period of time.

The formal order was specifically premised on the SEC's finding that information provided by its Enforcement Staff "tend[ed] to show that" Blinder, Robinson had been selling and purchasing "new issues of securities of highly speculative, recently organized issuers," and in connection therewith that Blinder, Robinson may have violated the anti-fraud provisions of the 1933 and 1934 Acts. The formal order directed the Enforcement Staff to conduct a private investigation to determine whether Blinder, Robinson and its agents "have engaged or are about to engage in any of the reported acts or practices or in any acts or practices of similar purport or object . . . ."[5]

It is unclear whether the Enforcement Staff ever used the formal order to investigate the activities the SEC directed its Staff to address, i.e., the penny stock issues

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[5] This language tracked the language of the statutory provision of the 1934 Act, which grants the SEC investigatory authority. Section 21(a) of the 1934 Act, 15 U.S.C. § 78u(a), provides that the SEC is empowered to "make such investigations as it deems necessary to determine whether any party has violated, is violating, or *is about to violate*" the federal securities laws. [Emphasis added.] *Cf.* Section 20(b) of the 1933 Act, 15 U.S.C. § 77t(b), which provides that the SEC may bring a civil injunctive action "[w]henever it shall appear . . . that any person *is engaged or about to engage* in any acts or practices which constitute or will constitute a violation . . . ." [Emphasis added.]

Blinder, Robinson had underwritten prior to August 1978, or the issues the firm was about to underwrite immediately after entry of the formal order on August 8, 1978. It is clear, however, that commencing over 17 months later, in or after January 1980, the Enforcement Staff used the then-stale formal order to conduct a wholly different investigation than that authorized by the August 1978 order: The unauthorized investigation concerned not a penny stock issued in 1978, but instead the underwriting in early 1980 of a $25 million issue of securities of American Leisure Corporation on an "all-or-none" best efforts basis. American Leisure was not a penny stock issue like the rest of the firm's underwritings; the securities sold were priced at $2.50 per unit. Blinder, Robinson's activities in connection with the American Leisure underwriting did not commence until December 1979, and most of the activities occurred in early 1980. Despite the fact that the firm's activities in the American Leisure offering were unrelated in time, nature or scope to the 1978 formal order, the SEC Enforcement Staff utilized the stale order to compel production of documents and sworn investigative testimony during the spring and summer of 1980 to investigate Blinder, Robinson's conduct of the American Leisure underwriting.

Blinder, Robinson formally requested the SEC Enforcement Staff to discontinue the investigation because it was not properly within the authority granted by the stale formal order, but the Staff refused to do so. On August 15, 1980, Blinder, Robinson filed suit in federal district court claiming these investigatory activities were unlawful and in violation of its constitutional rights, seeking damages and an injunction prohibiting the SEC from using the formal order and the evidence gathered thereunder as a basis for an enforcement action. The SEC, however, almost immediately thereafter filed a civil injunctive enforcement action against Blinder, Robinson in federal district court premised on the evidence about

the 1980 American Leisure offering illegally obtained by use of the August 1978 formal order. App. 2a.

Blinder, Robinson has consistently taken the position that the Enforcement Staff's use of the formal order to investigate conduct initially occurring well over a year after the formal order was entered was in violation of both the federal securities laws and the Fourth Amendment to the United States Constitution. As explained below, *the SEC has never been required to defend on the merits* this use of a stale, unlimited formal order to investigate unrelated future conduct that was not occurring or about to occur when the order was entered.

On October 7, 1980, after the SEC represented to the court that it would no longer use the defective order (after already having obtained illegally the evidence it sought to commence an enforcement proceeding against Blinder, Robinson), the United States District Court for the District of Colorado dismissed Blinder, Robinson's claim against the SEC as moot. App. 2a.[6] This determination was reversed by the Tenth Circuit because the unlawful order was, in fact, still outstanding, and thus there existed the threat that the SEC might reuse the defective order in the future to investigate the firm further. App. 2a. The SEC ultimately withdrew the formal order, but not before it had gathered the tainted evidence, which was used thereafter in the SEC's enforcement action against Blinder, Robinson. The enforcement action resulted in the court's imposition of a civil antifraud injunction against Blinder, Robinson. App. 14a.

During the course of the trial of the civil injunctive action, counsel for Blinder, Robinson failed, for some inexplicable reason, to object to the use of the tainted evidence. For this reason, the court dismissed Blinder, Robinson's parallel claim against the SEC based on the unlawful formal order (No. 83-2041), finding that

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[6] The trial judge invited Blinder, Robinson to challenge the formal order in the SEC's civil injunctive enforcement action.

Blinder, Robinson was collaterally estopped from challenging the legality of the formal order because it had failed to object to the evidence when it was introduced in the civil injunctive enforcement action. App. 15a-18a. Subsequently, this Court decided *Haring v. Prosise*, 462 U.S. 306 (1983), which suggests that collateral estoppel does not apply under these circumstances.[7] The SEC itself acknowledged in its papers on appeal that *Haring v. Prosise* rendered the district court's decision invalid,[8] but the Tenth Circuit, relying on arguments not even addressed by the district court below, affirmed. App. 4a-8a.[9]

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[7] In *Haring*, this Court held that a defendant's failure to raise the issue of an illegal search as a defense to a criminal prosecution did not preclude litigation of that issue in a subsequent civil proceeding claiming damages for the illegal search.

[8] The SEC stated:

> "The Commission agrees that the district court based its June 8, 1983 decision on law in this Circuit that necessarily changed after the Supreme Court's June 13, 1983 decision in *Haring v. Prosise* . . . . Prior to the decision in *Haring*, the Court had held that a defendant who pleaded guilty, and, therefore, did not contest the legality of a search warrant during an ensuing prosecution, was collaterally estopped from challenging it in an independent proceeding . . . . In *Haring*, however, the Supreme Court . . . held that a defendant is not estopped from challenging the legality of an investigation so long as that issue has not been actually litigated and necessarily decided against him . . . . Therefore, *Haring* would appear to preclude dismissal on collateral estoppel grounds because in this case, the district court made no specific finding in the Commission's injunctive action that the investigation was lawful or that the Commission's evidence was lawfully obtained." Brief of Appellee, No. 83-2041, at 11-12.

[9] The court of appeals affirmed on the ground that the unlawful formal order had been terminated and that Blinder, Robinson's challenge to it was therefore moot. App. 5a-6a, 8a. This mootness finding is directly contrary to this Court's holding in *SEC v. Sloan*, 436 U.S. 103, 108-10 (1978), that comparable actions by the SEC were not moot because the governmental action was "capable of repetition yet evading review." *Id.* at 108. *See infra* Part I.

To compound the harm resulting from the unlawful formal order and illegal investigation, the SEC in 1984 instituted an administrative disciplinary proceeding (the "administrative proceeding") against Blinder, Robinson in which the SEC Enforcement Staff is seeking to bar Meyer Blinder from the securities business and requesting substantial sanctions against the Blinder, Robinson firm.[10] The civil injunction obtained by the SEC through use of the tainted evidence is the sole predicate for the administrative proceeding. Blinder, Robinson's efforts to defend the administrative action by proving the unlawfulness of the formal order and of the evidence supporting the injunction were precluded by the administrative law judge.[11] Blinder, Robinson thus faces a possible license revocation which would close down its nationwide business based on evidence the propriety of which no court or administrative body has ever considered on the merits.[12]

Counsel's failure to object to the tainted evidence during trial was held by the district court to be the single act by which Blinder, Robinson was precluded from vindicating its constitutional rights, and perhaps protecting its very existence. It was this failure, and potential reasons for it, that Blinder, Robinson addressed in its motion for a new trial in the injunctive action (No. 84-1483) under Fed. R. Civ. P. 60(b). In its motion, Blinder, Robinson argued that its trial counsel had been

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[10] The SEC's Order for Proceedings in the administrative action appears at App. 23a-31a.

[11] *See* rulings by the Administrative Law Judge and the SEC, which appear at App. 32a-33a and App. 34a-37a, respectively.

[12] The State of California has also instituted an administrative license revocation proceeding against Blinder, Robinson based in part on the existence of the injunction against the firm obtained by the SEC. *See Commissioner of Corporations of the State of California v. Blinder, Robinson & Co., Inc.*, OAH No. L 33400, File No. 913 1230.

inexcusably negligent in failing to pursue the illegality defense. Citing no evidence, and without conducting an evidentiary hearing, the district court denied the motion on the ground that counsel were "competent and experienced lawyers who made a tactical decision which binds their clients." App. 19a. Upon appeal of the denial of the Rule 60(b) motion, petitioners discovered that their trial counsel also appeared to have had personal business interests which conflicted squarely with effective representation of his client: It may in fact have been in counsel's personal business interest that Blinder, Robinson *lose* its trial. Within two weeks after this counsel appeared at oral argument on appeal for Blinder, Robinson, he joined several Blinder, Robinson executives who abandoned the firm to form a competing broker-dealer firm, and lured away almost 200 Blinder, Robinson registered representatives to form the new firm's sales personnel. This apparent conflict of interest was brought to the attention of the Court of Appeals.[13] Nevertheless, the court of appeals affirmed the denial of the Rule 60(b) motion, also without citing any support and, most importantly, without addressing counsel's apparent conflict of interest. App. 8a-11a.

REASONS FOR GRANTING THE WRIT

I. PETITIONERS WERE UNFAIRLY DENIED THE OPPORTUNITY GUARANTEED BY *HARING v. PROSISE* TO HAVE THEIR FOURTH AMENDMENT CLAIMS ADJUDICATED

This petition presents the issue whether failure to pursue a Fourth Amendment defense in a civil enforcement action brought by a federal administrative agency precludes litigation of a Fourth Amendment claim against the agency in a separate civil proceeding. In

[13] *See* Reply Brief of Appellants, No. 84-1483, at 6 n.6. Petitioners noted that the SEC was informed of the apparent conflict of petitioners' counsel even before petitioners themselves were so informed. *Id.*

Haring v. Prosise, 462 U.S. 306 (1983), this Court held that a guilty plea in a state criminal proceeding will not bar litigation in a parallel civil proceeding of alleged Fourth Amendment violations committed by state enforcement officials in the underlying investigation of the criminal charges. There should be no different rule for federal agency enforcement officials.

If federal SEC agents violated petitioners' Fourth Amendment rights in conducting the administrative enforcement investigation in the case at bar, petitioners should be allowed to attempt to vindicate their Fourth Amendment rights in the separate proceeding instituted by them against the SEC and its agents. Failure to pursue an illegality defense in the civil enforcement suit brought by the SEC should not bar the parallel Fourth Amendment suit on either collateral estoppel or *res judicata* grounds, or under some other waiver theory. There are two important reasons why this is so, and why the SEC should not be granted an exception to the *Haring* rule for its civil and administrative enforcement proceedings: First, petitioners would not have been able to pursue their damage claims in the SEC civil enforcement suit. Second, courts have not uniformly accepted "illegality" as an affirmative defense to an SEC civil injunctive enforcement action.[14] Failure to accord petitioners their right to pursue their constitutional tort claims derogates petitioners' Fourth and Fifth Amendment rights.

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[14] *See, e.g., United States v. Fields*, 592 F.2d 638, 647-48 (2d Cir. 1978), *cert. denied*, 442 U.S. 917 (1979); *SEC v. National Student Marketing Corp.*, 538 F.2d 404, 406-07 (D.C. Cir. 1976) (per curiam), *cert. denied*, 429 U.S. 1073 (1977); *SEC v. Weil*, CCH Fed. Sec. L. Rep. ¶ 97,541 (M.D. Fla. 1980); *Wellman v. Dickinson*, 79 F.R.D. 341, 351-54 (S.D.N.Y. 1978). In an administrative proceeding brought by the California Department of Corporations against Blinder, Robinson, and in a related action in the California Superior Court, the administrative law judge and Superior Court judge, respectively, have refused to allow Blinder, Robinson to conduct discovery or to present evidence on the illegality defense. *See infra* note 17.

In reaching to affirm the district court [15] without running afoul of the *Haring* case, the Tenth Circuit held that when the "investigatory order terminated, there no longer existed a substantial controversy of sufficient immediacy and reality to justify the issuance of a declaratory judgment because the SEC could no longer investigate Blinder, Robinson under" the 1978 formal order. App. 6a.[16] This finding ignores the harm that Blinder,

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[15] The court of appeals also suggested that the complaint did not sufficiently raise a constitutional claim. App. 7a. Under the law of *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), and its progeny, it is clear that petitioners do have, and did plead sufficiently, a private cause of action against officers and agents of the SEC. *See United States v. Christine*, 687 F.2d 749 (3d Cir. 1982); *United States v. Kember*, 648 F.2d 1354 (D.C. Cir. 1980); *Zweibon v. Mitchell*, 606 F.2d 1172 (D.C. Cir. 1979), *cert. denied*, 453 U.S. 912 (1981). In his landmark case, Mr. Bivens claimed that federal agents entered his apartment, arrested and manacled him, searched the apartment thoroughly—all without a warrant and with unreasonable force—and jailed him; "claimed to have suffered great humiliation, embarrassment, and mental suffering"; and sought damages from each agent who mistreated him. 403 U.S. at 389-90. In like manner, Blinder, Robinson: (1) complained of an unlawfully broad general warrant (in the form of an unlimited formal order); (2) cited the SEC's use of the formal order to inquire into Blinder, Robinson's underwritings, securities transactions, customers, and banking relations, all at a cost of significant numbers of customers and impaired banking relationships; and (3) alleged that its Fourth Amendment rights were violated by SEC agents acting under color of authority of the unlawful formal order. The formal order standing alone—on its face unlimited in time or scope—constitutes a sufficient showing for pleading a constitutional claim. *See Welker v. United States*, 664 F.2d 1384, 1386 (9th Cir. 1982); *Covington v. Cole*, 528 F.2d 1365, 1367 & n.2 (5th Cir. 1976); *Bethea v. Reid*, 445 F.2d 1163, 1165 (3d Cir. 1971); *cert. denied*, 404 U.S. 1061 (1972).

[16] The court of appeals relied on *Ashcroft v. Mattis*, 431 U.S. 171, 172-73 n.2 (1977) (per curiam), for the proposition that the SEC's improper actions do not present a "live controversy." App. 6a. *Ashcroft*, however, specifically contemplates issuance of a declara-

Robinson had suffered, was suffering, and continues to suffer as a result of the unlawful formal order and the investigation conducted thereunder.[17]

The SEC's belated withdrawal of the unlawful formal order did not render the controversy moot because its illegal conduct casts a "'continuing and brooding presence' over [petitioners] . . . ." *Preiser v. Newkirk*, 422 U.S. 395, 403 (1975); *Super Tire Engineering Co. v. McCorkle*, 416 U.S. 115, 122 (1974).[18] In addition, this case resembles closely those cases in which mootness was

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tory judgment when there is a dispute "which 'calls . . . for an adjudication of present right upon established facts.'" *Id.* at 172. Such established facts—the overbreadth of the formal order, the use of tainted evidence by the SEC, and the harm to Blinder, Robinson—clearly exist here.

[17] In its second amended complaint, Blinder, Robinson sought (i) to enjoin the SEC from using any formal order and evidence adduced thereunder in violation of its constitutional rights, and (ii) damages suffered as a result of the SEC's unconstitutional and unlawful acts. The court of appeals, for reasons that it did not explain, interpreted the complaint as one solely for an injunction against future unlawful formal orders. App. 5a-6a. But Blinder, Robinson had suffered and continues to suffer enormous harm by virtue of the 1978 formal order. Not only has the company lost significant numbers of customers, potential customers, and potential financings and suffered an adverse impact on all-important banking relationships, but the SEC and now other state administrative agencies are currently using evidence seized pursuant to the formal order in administrative enforcement proceedings against Blinder, Robinson. In an administrative proceeding brought by the California Department of Corporations, state regulators are seeking to revoke Blinder, Robinson's broker-dealer license in California based in large part on the injunction obtained with the tainted evidence in the SEC's civil injunctive enforcement action. *Commissioner of Corporations of the State of California v. Blinder, Robinson & Co., Inc.*, OAH No. L 33400, File No. 913 1230.

[18] *See Dow Chemical Co. v. EPA*, 605 F.2d 673, 677-79 (3d Cir. 1979); *Sun Oil Co. v. NLRB*, 576 F.2d 553, 558 n.3 (3d Cir. 1978); *Union National Bank v. ICC*, 569 F.2d 742, 746 (3d Cir. 1977); *Nader v. Volpe*, 475 F.2d 916, 917 (D. C. Cir. 1973).

no bar to review because of the possible recurrence of the disputed issue.[19] Here, the court of appeals avoided this issue by "presum[ing] that administrative agencies such as the SEC will act within the law." App. 5a-6a. Yet where, as here, the SEC Enforcement Staff has demonstrably *not* acted within the law, and could obtain and use a similarly unlawful order in the future, this presumption should not be applicable.[20]

The Tenth Circuit's mootness finding flies squarely in the face of this Court's holding in *SEC v. Sloan*, 436 U.S. 103, 108-10 (1978). In *Sloan*, the SEC extended ten-day trading suspensions on a "rollover" basis without providing the securities issuer any form of administrative due process hearing. Even though the SEC had ceased renewing the trading suspensions after the issuer complained of the SEC's conduct, this Court held that the issuer's complaint was not moot because the SEC might harm the issuer again in the future by reinstituting a similar trading suspension without granting a hearing. The potential harm to petitioner in the case at bar is comparable to that which this Court found sufficient to defeat a mootness claim in *Sloan*.

The court of appeals also concluded that compliance with the subpoenas rendered petitioners' injunctive action moot (App. 6a).[21] However, there is a decided split

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[19] Where an issue is capable of repetition yet evading review, an appeal is not moot. *See Roe v. Wade*, 410 U.S. 113, 125 (1973); *Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911).

[20] A future unlawful order could evade review if, as the SEC did here, the offending agency withdrew the order after using it to obtain tainted evidence.

[21] The only case cited by the court of appeals for the proposition that compliance with the subpoena rendered the complaint moot, *EEOC v. St. Regis Paper Co.-Kraft Division*, 717 F.2d 1302, 1303 (9th Cir. 1983), is inapposite. In *St. Regis*, once the objecting party had complied with the subpoena, that party suffered no other harm, so the controversy ceased. *Id.* at 1303. In contrast, a controversy still rages in the present case. The SEC has recently used

among the circuits on this issue. The First,[22] Fourth,[23] Eighth,[24] and Ninth Circuits[25] hold that compliance with a subpoena renders moot a challenge to the subpoena. On the other hand, the Third,[26] Seventh,[27] and District of Columbia[28] circuits have held that compliance does not moot the challenge, and the Fifth Circuit itself is split.[29] Moreover, where, as here, substantial public interest questions are raised by a government subpoena, an appeal

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fruits of the tainted evidence in an administrative proceeding which could put Blinder, Robinson out of business, and fruits of the tainted evidence will apparently continue to be used in future actions against Blinder, Robinson. *See supra* note 17. Indeed, the SEC Division of Enforcement in the pending SEC administrative disciplinary proceeding is seeking to bar Meyer Blinder permanently from the securities business based solely on the injunction which was founded on the tainted evidence.

[22] *United States v. Arthur Andersen & Co.*, 623 F.2d 720 (1st Cir. 1980).

[23] *Kurshan v. Riley*, 484 F.2d 952 (4th Cir. 1973).

[24] *Barney v. United States*, 568 F.2d 116 (8th Cir. 1978) (per curiam).

[25] *SEC v. Laird*, 598 F.2d 1162 (9th Cir. 1979).

[26] *United States v. Friedman*, 532 F.2d 928 (3d Cir. 1976).

[27] *In re Special April 1977 Grand Jury*, 581 F.2d 589 (7th Cir.), *cert. denied*, 439 U.S. 1046 (1979).

[28] *SEC v. McGoff*, 647 F.2d 185, 190 n.4 (D.C. Cir.), *cert. denied*, 452 U.S. 963 (1984); *FTC v. Browning*, 435 F.2d 96, 97-98 n.1 (D.C. Cir. 1970).

[29] *See FTC v. Gibson Products of San Antonio, Inc.*, 569 F.2d 900, 903 (5th Cir. 1978) (controversy still alive notwithstanding compliance because if case decided in favor of subpoenaed party, relief available by order requiring return of subpoenaed documents and to forbid use of documents in hearing); *United States v. First State Bank of Clute*, 626 F.2d 1227 (5th Cir. 1980) (allegations of unconstitutionality of summons procedure not moot despite compliance), *cert. denied sub. nom Jarvis v. United States*, 452 U.S. 908 (1981). *Contra Grathwohl v. United States*, 401 F.2d 166 (5th Cir. 1968); *United States v. First American Bank*, 649 F.2d 288 (5th Cir. 1981) (allegations of unconstitutionality held moot; *Clute* rejected).

should not be rendered moot by compliance with the subpoena.[30]

Blinder, Robinson is not, as the court of appeals suggests (App. 6a), merely pursuing a "claim to declare the subpoenas unlawful." Rather, Blinder, Robinson is fighting for its very life to preclude the SEC's continuing use of illegally-obtained evidence, and the fruits of that evidence, in a series of proceedings which threaten to cripple, and eventually kill, the firm's business. And if petitioners are unsuccessful in preventing the fruits of the unlawful investigation from being used to destroy their nationwide business, at a minimum they seek damages for their injuries from those government agents that acted unlawfully in violation of the Fourth Amendment. The *Haring* case should provide them with a forum to adjudicate their Fourth Amendment claims against the SEC and its agents.

II. THE FACIALLY DEFECTIVE SEC FORMAL ORDER OF INVESTIGATION, AND THE ILLEGAL ENFORCEMENT INVESTIGATION CONDUCTED THEREUNDER, VIOLATED PETITIONERS' FOURTH AMENDMENT RIGHTS AND THE FEDERAL SECURITIES STATUTES

The decisions of the courts below precluded petitioners from adjudicating a fundamental issue respecting federal agency investigative power: whether an SEC formal order of investigation (and resulting subpoenas) must comply with the Fourth Amendment's prohibition against overbroad search warrants[31] Petitioners' claims also raised serious questions concerning the statutory limita-

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[30] *Cf. United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953); *Big Rivers Electric Corp. v. EPA*, 523 F.2d 16, 19 (6th Cir. 1975).

[31] U.S. Const. amend. IV. *See, e.g., Ybarra v. Illinois*, 444 U.S. 85, 92 (1979); *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319 (1979); *Stanford v. Texas*, 379 U.S. 476 (1965); *Marron v. United States*, 275 U.S. 192, 196 (1927).

tions on the investigatory powers of the SEC Enforcement Staff.

That the SEC formal order of investigation, and the investigation conducted thereunder, was unconstitutional and unlawful is apparent. This Court faced a similar situation in *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978). A proprietor who objected to an administrative inspection sought injunctive relief against warrantless searches attempted by the Occupational Safety and Health Administration ("OSHA"). The inspecting agency had applied for and had been issued an order authorizing the inspection. As in the present case, however, the order was fatally lacking in specificity. The Court held the OSHA law authorizing warrantless inspections was unconstitutional as a violation of the Fourth Amendment's Warrant Clause, relying on the basis for the warrant requirement—to "advise the owner of the scope and objects of the search, beyond which limits the inspector is not expected to proceed." 436 U.S. at 323. This requirement, which was not met in the *Barlow's* case, has not been met in the case at bar.

SEC formal orders are not excepted from "the Fourth Amendment require[ment] that the subpoena be sufficiently limited in scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome." [32] Moreover, the breadth of the investigation itself may exceed the SEC's statutory authority. "[A] governmental investigation into corporate matters may be of such a sweeping nature and so unrelated to the matter properly under inquiry as to exceed the in-

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[32] *SEC v. Arthur Young & Co.*, 584 F.2d 1018, 1024 (D.C. Cir. 1978), *cert. denied*, 439 U.S. 1071 (1979), citing *See v. City of Seattle*, 387 U.S. 541, 544 (1967). *See also United States v. Powell*, 379 U.S. 48, 57 (1964); *United States v. Morton Salt Co.*, 338 U.S. 632, 652-53 (1950); *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 208 (1946).

vestigatory power." [33] If an agency seeks from a subject of an investigation disclosure that is too indefinite and not reasonably relevant to the conduct stated in the authorizing order, the inquiry is unlawful.[34]

The actions of the SEC and its Enforcement Staff here violated its own enabling statutes as well as the United States Constitution. Section 21(a) of the 1934 Act grants the SEC the right to "make such investigations as it deems necessary to determine whether any party has violated, is violating, or is about to violate" the federal securities laws.[35] But the evidence obtained by the SEC staff by subpoena and through testimony authorized by the August 1978 formal order related to matters occurring long after August 1978, and involved a securities underwriting that did not exist and was not even planned until long after August 1978. No linguistic machinations can make the 1980 investigation relevant to whether petitioners, in August 1978, had violated, were violating or were "about to violate" the securities laws.[36]

The SEC continually investigates publicly-owned companies. Formal orders of investigation generally follow an earlier informal investigation which provides the factual basis for the formal order.[37] If orders as unlimited as the one at issue here are not subject to challenge, the SEC will have *carte blanche* to subpoena documents

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[33] *United States v. Morton Salt Co.*, 338 U.S. at 652. *Accord SEC v. Arthur Young & Co.*, 584 F.2d at 1023.

[34] *United States v. Morton Salt Co.*, 338 U.S. at 652. *Accord SEC v. Arthur Young & Co.*, 584 F.2d at 1024.

[35] App. 39a.

[36] *See SEC v. Jerry T. O'Brien, Inc.*, 104 S. Ct. at 2723 n.1.

[37] *See* Merrifield, *Investigations by the Securities and Exchange Commission*, 32 Bus. Law. 1583, 1598 (July 1977); Sorkin and Jakoby, *SEC Investigations*, 18 Rev. Sec. & Comm. Reg. 45, 46 (Feb. 20, 1985).

and coerce testimony addressing virtually any aspect of a company's business on a continuing and open-ended basis without any requirement that some basis exist for believing that statutory violations have possibly occurred or are about to occur.[38] This unlimited discretion to mandate document production and testimony squarely violates the Fourth Amendment. The courts must make clear to the SEC, as well as other federal administrative agencies with enforcement investigatory powers, that they must stay within constitutional bounds, as well as within their specific statutory powers, in issuing investigatory orders, and in policing the investigatory efforts of their Enforcement Staffs.

III. PETITIONERS HAD A DUE PROCESS RIGHT TO AN EVIDENTIARY HEARING ON THE QUESTION OF THEIR COUNSEL'S APPARENT CONFLICT OF INTEREST

This petition also presents the issue whether a defendant in a Government law enforcement proceeding who learns, following termination of its counsel's services, that its counsel may have had a direct conflict of interest with the client during the representation has a right to a factual hearing on a motion for a new trial. The courts below precluded such a hearing by resolving petitioners' Rule 60(b) motion summarily. The court of appeals was swayed in its decision by its belief (without any factual record) that counsel representing Blinder, Robinson in the enforcement action was "competent" (App. 11a) and made a "tactical decision" (App. 6a, 11a) not to raise in the civil injunctive enforcement

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[38] A senior SEC Enforcement official has recently pointed out that language in an SEC formal order of investigation "must . . . be specific enough to allow for the issuance of subpoenas that will not be quashed on the ground that the enabling formal order is so ambiguous as to permit an unauthorized fishing expedition." Sorkin and Jakoby, *SEC Investigations*, 18 Rev. Sec. & Comm. Reg. at 47 (footnote omitted).

action the issue of the invalidity of the formal order. Because petitioners were given no opportunity to establish the grounds for a new trial at an evidentiary hearing, there is no support in the record for the court of appeals' conclusions regarding counsel. The failure to grant petitioners an evidentiary hearing violated Blinder, Robinson's fundamental right to due process in a law enforcement proceeding brought by the Government. The Court should grant this petition to affirm the viability of such a right.

The right to counsel in a criminal prosecution guaranteed by the Sixth Amendment is a fundamental right. U.S. Const. amend. VI; *Argersinger v. Hamlin*, 407 U.S. 25, 29-33 (1972). Unless a defendant charged with a serious offense has counsel able to invoke the procedural and substantive safeguards that distinguish our system of justice, a serious risk of injustice infects the trial itself. *Gideon v. Wainwright*, 372 U.S. 335, at 344 (1963). *See Johnson v. Zerbst*, 304 U.S. 458, 467-68 (1938).

The quasi-criminal nature of an SEC injunctive action invokes somewhat comparable due process consideration.[39] Where counsel for a defendant in a government law enforcement proceeding allows conflicts of interest to interfere with his legal representation, the effect is akin to lack of representation entirely. At a minimum it raises questions of fundamental fairness imbued in the Fifth Amendment.[40] Because petitioners stand "to

[39] The imposition of an anti-fraud injunction against a broker-dealer like petitioner triggers severe direct and indirect statutory disqualifications. *See SEC v. American Board of Trade, Inc.*, 751 F.2d 529 (2d Cir. 1984). For example, the injunction against petitioners in the case at bar is already being used as a basis for severe disciplinary sanctions by the SEC Enforcement Staff, *see App.* 23a-31a, and by the State of California, *see supra* note 17. Moreover, as a result of the injunction, Blinder, Robinson is also subject to disqualification under Regulation A, § 230.252(d) & (e), and Regulation D, § 230.505(b)(2)(iii), of the 1933 Act.

[40] *See* U.S. Const. amend. V. The failure of retained counsel to provide adequate representation can render a trial so fundamentally

lose the valuable privilege of [their broker-dealership] in the securities industry,"[41] due process unquestionably entitles them to a fair hearing,[42] and "due process assured [them] the right to retain independent counsel . . . ." [43]

By proving that an actual conflict of interest adversely affected his lawyer's performance, a client establishes a constitutional violation.[44] This necessarily requires an evidentiary hearing at which the showing can be made. Once a court concludes that a lawyer had an actual conflict of interest, prejudice and, therefore, ineffectiveness will be presumed.[45] The conflict itself demonstrates "a denial of the 'right to have the effective assistance of counsel.' " [46] Moreover, just as a defendant demonstrates a violation of his Sixth Amendment rights when he establishes "that an actual conflict of interest adversely affected his lawyer's performance," *Cuyler v. Sullivan*, 446 U.S. 335, 350 (1980), his rights to proce-

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unfair as to violate the Fifth and Fourteenth Amendments. *Cuyler v. Sullivan*, 446 U.S. 335, 344-45 (1980). *See Fitzgerald v. Estelle*, 505 F.2d 1334, 1336 (5th Cir. 1974) (the conviction of a defendant after a trial that is fundamentally unfair as a result of a lawyer's ineffectiveness violates due process), *cert. denied*, 422 U.S. 1011 (1975).

[41] *Sartain v. SEC*, 601 F.2d 1366, 1375 (9th Cir. 1979), citing *Hanly v. SEC*, 415 F.2d 589, 595 (2d Cir. 1969).

[42] *See Sartain v. SEC*, 601 F.2d at 1375, citing *Goldberg v. Kelly*, 397 U.S. 254 (1970), *Hannah v. Larche*, 363 U.S. 420 (1960), and Section 555(b) of the Administrative Procedure Act, 5 U.S.C. § 555(b).

[43] *Sartain v. SEC*, 601 F.2d at 1375, citing *United States v. Weiner*, 578 F.2d 757, 773 (9th Cir. 1978).

[44] *Cuyler v. Sullivan*, 446 U.S. at 348.

[45] *United States v. Cronic*, 104 S. Ct. 2039, 2048 n.28 (1984) *Glasser v. United States*, 315 U.S. 60, 76 (1942). *See Holloway v. Arkansas*, 435 U.S. 475, 487-91 (1978).

[46] *Cuyler v. Sullivan*, 446 U.S. at 349.

dural due process guaranteed by the Fifth Amendment are infringed as well.[47]

If this were ordinary commercial litigation, the consequences of counsel's possible conflict-of-interest-tainted representation would not be so severe. But counsel's apparent conflict, together with his incontrovertible neglect, may well have operated to deny Blinder, Robinson the opportunity to defend itself against the SEC by proving that its constitutional rights had been violated. A hearing on Blinder, Robinson's Rule 60(b) motion would have consumed little time and effort. The courts' rulings on the motion and appeal would have had the benefit of the necessary facts. Since the facts were not developed in the record, the failure to hold a hearing amounted to an abuse of discretion.[48]

In affirming the district court's denial of the Rule 60(b) motion, the panel's opinion simply does not address the conflict of interest argument. It observes instead that "free, calculated, deliberate choices are not to be relieved from."[49] This may be so, when choices are genuinely "free, calculated, [and] deliberate." But counsel's tactics here, if indeed they were colored by a conflict with

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[47] *See Sartain v. SEC*, 601 F.2d at 1375.

[48] *See Surety Insurance Co. v. Williams*, 729 F.2d 581, 583 (8th Cir. 1984) (because motion to vacate judgment stated claim cognizable under Rule 60(b), district court abused its discretion in summarily denying motion without any type of evidentiary hearing); *Clarke v. Burkle*, 570 F.2d 824, 832 (8th Cir. 1978); *Laguna Royalty Co. v. Marsh*, 350 F.2d 817 (5th Cir. 1965). *Cf. Associates Discount Corp. v. Goldman*, 524 F.2d 1051, 1054 (3d Cir. 1975).

[49] App. 11a. The court of appeals cites *Link v. Wabash Railroad Co.*, 370 U.S. 626 (1962) in support of the position that the sins of the plaintiff's lawyer should not be visited on the defendant. Yet such a position could hardly apply when constitutional issues are at stake and the defendant is, among others, the United States Government, which believes that "[t]he United States wins its case whenever justice is done." Department of Justice Building, Washington, D.C.

his client, can hardly be termed "deliberate" acts of the client. There is no evidence that any "tactical decision" was made *on the client's behalf.*[50] If the record is developed at a hearing to determine when the apparent conflict first arose, the contrary may turn out to be true. "Represent[ing] conflicting interests is suspect because of what it tends to prevent the attorney from doing." *Holloway v. Arkansas*, 435 U.S. 475, 489-90 (1978). This may have been exactly what happened in the present case given counsel's apparent efforts to form a rival firm to his client, using his client's personnel, during the course of his representation.

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[50] The notion that Blinder, Robinson's former lead counsel made a tactical decision which should bind his client might have support if there were no basis to believe that his decisions were not made with zealous protection of his client's interests in mind. The fact that it is virtually impossible to conceive of a tactical advantage to be achieved by forgoing a challenge to the tainted evidence in the civil injunctive enforcement action, however, is strong evidence that something more than a "tactical decision" may have entered into counsel's considerations. A possible incentive to *disregard* his client's interests surfaced when, within two weeks of the oral argument on the appeal of the injunction against Blinder, Robinson, top executives of the firm broke away to form a competing broker-dealer, taking with them some 200 officers, managers, brokers, and employees. Blinder, Robinson's counsel was instrumental in helping to form this new broker-dealer, and joined it as general counsel, executive vice-president, and a general securities principal. In view of such an apparent conflict of interest, which may have existed at the time of trial, and the existence of which would have undermined in a fundamental way the very fairness of the enforcement proceeding, the district court was obligated to conduct an evidentiary hearing on Blinder, Robinson's Rule 60(b) motion.

CONCLUSION

The combination of the district court's erroneous dismissal of Blinder, Robinson's challenge to the unlawful formal order and the ensuing illegal investigation, and counsel's possible conflict-ridden representation, would mean that unconstitutional and unlawful actions of the United States Government would be without remedy. This Court should not permit such a result.

For the reasons set forth above, certiorari should be granted to review the judgments of the court of appeals.

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April 2, 1985

APPENDIX

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APPENDIX

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Nos. 83-2041, 84-1483

BLINDER, ROBINSON & CO., INC. and MEYER BLINDER,
Plaintiffs-Appellants,

v.

UNITED STATES SECURITIES AND EXCHANGE COMMISSION,
THE UNITED STATES OF AMERICA, and
UNNAMED OFFICERS AND AGENTS,
Defendants-Appellees.

SECURITIES AND EXCHANGE COMMISSION,
Plaintiff-Appellee,

v.

BLINDER, ROBINSON & CO., INC., and MEYER BLINDER,
Defendants-Appellants.

Nov. 27, 1984

Rehearing Denied Jan. 2, 1985

Before SETH, BREITENSTEIN and SEYMOUR, Circuit Judges.

BREITENSTEIN, Circuit Judge.

No. 83-2041 is an appeal by plaintiffs-appellants Blinder, Robinson & Company, Inc. and Meyer Blinder, hereafter Blinder, Robinson, from an order of the United States District Court for the District of Colorado dismiss-

ing its complaint against the Securities and Exchange Commission, SEC, seeking an injunction, declaratory relief, and monetary damages.

No. 84-1483 is an appeal by Blinder, Robinson from an order of the district court denying relief under a Rule 60(b) motion. The facts are complex.

On August 3, 1978, SEC issued an "ORDER DIRECTING PRIVATE INVESTIGATION AND DESIGNATING OFFICERS TO TAKE TESTIMONY" directed against Blinder, Robinson, a registered stock broker-dealer, to investigate charges of violation of the federal securities acts. In May, 1979, Blinder, Robinson became the underwriter of an offering of American Leisure Corporation to sell 10,000,000 units of securities at a price of $2.50 per unit. The completion date of the offering was March 25, 1980, but the offering was not then completed.

On August 15, 1980, Blinder, Robinson filed a complaint in the federal district court for the District of Colorado against the SEC to enjoin the SEC from using the August 3, 1978, order which was alleged to be invalid. On August 27, 1980, SEC brought an enforcement action against Blinder, Robinson to enforce its order finding that Blinder, Robinson had engaged in security [sic] act violations in connection with the American Leisure offering.

On October 7, 1980, the district court dismissed the injunction suit brought by Blinder, Robinson against SEC as moot. On June 8, 1982, the district court upheld the SEC in the enforcement action and ordered its orders enforced. See *SEC v. Blinder, Robinson & Co.*, 542 F. Supp. 468. On October 27, 1982, the Tenth Circuit Court of Appeals reversed the Blinder, Robinson injunction suit holding that the case was not moot. See 692 F.2d 102.

On January 10, 1983, Blinder, Robinson filed its second amended complaint against SEC. The SEC moved for

summary judgment and attached copies of affidavits of its personnel showing the termination of the August 3, 1978, investigatory order on September 9, 1982. See R. 174-179. The district court on June 8, 1983, again dismissed the injunction suit. See 565 F.Supp. 74. Case No. 83-2041 is an appeal from that dismissal. On September 19, 1983, the Tenth Circuit Court of Appeals affirmed the judgment in favor of SEC in the enforcement action. See unpublished opinion in No. 82-1954. Thereafter, Blinder, Robinson filed a motion to consolidate the appeals in No. 82-1954 and No. 83-2041 and a petition for rehearing with suggestion for en banc consideration. These motions were all denied by minute orders.

On January 16, 1984, Blinder, Robinson filed a motion to set aside the dismissal of its injunction action under Rule 60(b), F.R.Civ.P. On April 3, 1984, the district court denied the motion. No. 84-1483 is an appeal from this order. We consolidated No. 83-2041 and No. 84-1483 for argument and disposition.

The June 8, 1983, grant of the SEC motion for summary judgment is based on collateral estoppel. Blinder, Robinson says that this is incorrect under the Supreme Court's opinion of June 13, 1983 in *Haring v. Prosise*, 462 U.S. 306, 103 S.Ct. 2368, 76 L.Ed.2d 595. SEC agrees that *Haring* changes the law in this circuit with respect to collateral estoppel. SEC argues that even if the district court's action runs contra to the decision in *Haring*, it should be affirmed for a different reason. The order of August 3, 1978, has been terminated. The second amended complaint alleges, R. 121, that:

> "The Commission, despite the filing of this action in August 15, 1980, refused to withdraw the formal order and only did so immediately prior to a scheduled conference on December 10, 1982."

An affidavit submitted by SEC shows that the date of termination was September 9, 1982. R. 174.

In *First National Bank of Wichita v. Luther*, 10 Cir., 1954, 217 F.2d 262, 266, we recognized that:

> ". . . it is consistently held that an order or judgment which is correct in ultimate effect will not be disturbed on appeal even though the lower tribunal relied upon a wrong ground or gave an untenable reason for its action. The issue on appeal is the correctness in ultimate effect of an order or judgment, not the reason or reasons given therefore by the trial court. And if an order or judgment is sustainable upon any legal basis, it will be upheld on appeal . . . ."

See also *Texaco, Inc. v. Holsinger*, 10 Cir., 1964, 336 F.2d 230, 233, cert. denied 379 U.S. 970, 85 S.Ct. 669, 13 L.Ed.2d 563.

In *Helvering v. Gowran*, 302 U.S. 238, 245, 58 S.Ct. 154, 158, 82 L.Ed. 224, the Court said:

> "In the review of judicial proceedings the rule is settled that if the decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason."

Blinder, Robinson in their second amended complaint requests the court to issue a permanent injunction against the SEC from utilizing an order of investigation in violation of the plaintiffs' Fourth and Fifth Amendment rights and to declare that the August 3, 1978 order and any investigation conducted thereunder were invalid. As we have shown the order of investigation was terminated.

Under Art. III of the Constitution, federal court jurisdiction "depends on the existence of a case or controversy." *North Carolina v. Rice*, 404 U.S. 244, 246, 92 S.Ct. 402, 404, 30 L.Ed.2d 413. "It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts." *Aetna Life Insurance Co. v.*

Haworth, 300 U.S. 227, 241, 57 S.Ct. 461, 464, 81 L.Ed. 617. The controversy must exist at all stages of the proceedings, "not merely at the time the complaint is filed." *Preiser v. Newkirk*, 422 U.S. 395, 401, 95 S.Ct. 2330, 2334, 45 L.Ed.2d 272. The relief sought must be capable of addressing the alleged harm. *Iron Arrow Honor Society v. Heckler*, —— U.S. ——, 104 S.Ct. 373, 374-375, 78 L.Ed.2d 58.

When SEC terminates a formal order of investigation, the staff may no longer issue subpoenas or otherwise investigate matters described in the order. See generally 17 C.F.R. 200.30-4(a)(1)-(4) and 202.5. In *Blinder, Robinson v. SEC*, 10 Cir., 1982, 692 F.2d 102, 106, we held that the claims were not moot because the investigatory order was still in effect, saying, "The SEC may, at its election, resume the Blinder investigation pursuant to the outstanding order. Accordingly, the complained of action is capable of repetition."

Blinder, Robinson asks the court to issue a declaration that the order of investigation and any investigation conducted thereunder is invalid. In *Preiser*, supra, 422 U.S. at 402, 95 S.Ct. at 2334, the Court acknowledged the difficulty in formulating a test to determine whether a request for declaratory relief was moot. It held, quoting *Maryland Casualty Co. v. Pacific Co.*, 312 U.S. 270, 273, 61 S.Ct. 510, 512, 85 L.Ed. 826, that "the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, *of sufficient immediacy and reality to warrant the issuance of a declaratory* judgment." [Emphasis in original.]

Blinder, Robinson argues that there is a reasonable likelihood that the Commission will continue to grant formal orders of investigation in violation of plaintiffs' constitutional rights. Second Amended Complaint, ¶ 25, R. 122. It is presumed that administrative agencies such as

the SEC will act within the law. *FCC v. Schreiber*, 381 U.S. 279, 296, 85 S.Ct. 1459, 1470, 14 L.Ed.2d 383; *McGarry v. Securities and Exchange Commission*, 10 Cir., 1945, 147 F.2d 389, 393. Plaintiffs' assertion that it is reasonably likely that the SEC will violate their rights in the future, without more, is insufficient to establish a present, live controversy. See *Ashcroft v. Mattis*, 431 U.S. 171, 172-173, n. 2, 97 S.Ct. 1739, 1740, n. 2, 52 L.Ed.2d 219.

When the investigatory order terminated, there no longer existed a substantial controversy of sufficient immediacy and reality to justify the issuance of a declaratory judgment because the SEC could no longer investigate Blinder, Robinson under that order. To the extent Blinder, Robinson and other subpoena recipients have complied with subpoenas issued prior to the termination of the investigatory order, any claim to declare the subpoenas unlawful is moot. *EEOC v. St. Regis Paper Co.-Kraft Division*, 9 Cir., 1983, 717 F.2d 1302, 1303. Blinder, Robinson's attorneys made a tactical decision not to raise in the enforcement action the question of the validity of the investigatory order.

The court noted in *Blinder, Robinson*, supra, 692 F.2d at 106-107, that SEC must meet the heavy burden "of demonstrating that there is no reasonable expectation that the alleged wrongs will be repeated." The SEC has made such a showing, the termination of the order.

The third cause of action in the Blinder, Robinson second amended complaint charges that officers, employees, and agents of SEC wrongfully used the investigatory order to deprive Blinder, Robinson of constitutional rights to its damage and asks for monetary damages against them. The officers, employees, and agents of the SEC are not named.

No allegation is made of a violation of the Federal Tort Claims Act nor could it have been made. The Tort

Claims Act, 28 U.S.C. 2671-2680, waives the immunity of the United States to tort claims. The statute provides, § 2675(a), that the claim first be presented to the agency engaged in the unlawful conduct. Because Blinder, Robinson did not fulfill this requirement, the Act provides no basis for its claim for damages. *Three-M Enterprises, Inc. v. U.S.*, 10 Cir., 1977, 548 F.2d 293, 294.

Federal employees are immune from monetary liability for common law torts resulting from acts "within the outer perimeter of [their] line of duty." *Barr v. Mateo*, 360 U.S. 564, 575, 79 S.Ct. 1335, 1341, 3 L.Ed.2d 1434. See *Butz v. Economou*, 438 U.S. 478, 495, 98 S.Ct. 2894, 2905, 57 L.Ed.2d 895. The only unlawful acts attributed in the second amended complaint to the unnamed SEC officers is the issuance of subpoenas "pursuant to the formal order, and otherwise acting under color of authority of the formal order." Second Amended Complaint, ¶ 16, R. 120. On the face of the complaint, the unnamed officers were acting within the scope of their duties and cannot be sued for common law tort.

To state a constitutional claim, plaintiff must do more than simply state a conclusion or engage in "artful pleading." *Butz*, supra, 438 U.S. at 507, 98 S.Ct. at 2911; *Gulf Coast Western Oil Co., Inc. v. Trapp*, 10 Cir., 1947, 165 F.2d 343, 347, cert. denied 338 U.S. 826, 70 S.Ct. 74, 94 L.Ed. 502. A plaintiff must state a compensable claim for relief that details the facts forming the basis for the claim. *Mountain View Pharmacy v. Abbott Laboratories*, 10 Cir., 1980, 630 F.2d 1383, 1386-1387. Plaintiff states that defendants violated the Fourth and Fifth Amendments of the federal Constitution and unnamed sections of the Colorado Constitution. These allegations fall short of the requirement that plaintiff plead specific facts to support a constitutional claim.

We need not determine whether the SEC, its agents and employees have an absolute or qualified immunity. See *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727,

73 L.Ed.2d 396. Blinder, Robinson claims that the issuance of subpoenas was an unconstitutional intrusion into their affairs. SEC points out that *SEC v. O'Brien*, —— U.S. ——, 104 S.Ct. 2720, 2725, 81 L.Ed.2d 615, holds that SEC subpoenas "are not self-enforcing and the recipients thereof are not subject to penalty for refusal to obey." Subpoena recipients may obtain judicial review by simply refusing to comply with subpoenas and forcing the SEC to bring subpoena enforcement actions. O'Brien forecloses any argument that Blinder, Robinson could suffer irreparable harm if SEC issued defective subpoenas to other persons. The Court said, 104 S.Ct. at 2726:

> "[W]hen a person communicates information to a third party even on the understanding that the communication is confidential, he cannot object if the third party conveys the information or the records thereof to law enforcement authorities."

This rule would prevent Blinder, Robinson from arguing that it would be irreparably injured by the issuance of subpoenas to third parties. The conclusory allegation that the subpoenas issued violated Blinder, Robinson's constitutional rights does not suffice to state a claim. The Third Cause of action was properly dismissed.

This brings us to No. 84-1483, the appeal from the denial of Rule 60(b) relief. The enforcement action was tried July 6-14, 1981. At the trial the defendants did not seek to suppress or otherwise object to the introduction of evidence derived from the "tainted" investigation. *Blinder, Robinson & Co. v. U.S. SEC*, 565 F.Supp. 74, 76. In their motion for relief under Rule 60(b), the defendants say: "former counsel for Blinder *did not object* to the introduction of this illegal and tainted evidence in the Enforcement Action." R. 5.

The appeal in the enforcement action was docketed in this court on August 9, 1982. On January 24, 1983, the

appellants moved to remand the case. On February 17, 1983, this court denied the motion and invited the defendants to renew the motion before the panel which heard the arguments. SEC in its response to the Rule 60(b) motion said, and it is not denied, that, R. 67:

> "Although defendants' present counsel, Mr. Lowery, sat at counsel's table during oral argument, defendants did not pursue that option. Counsel for defendants did not once mention during oral argument their claim that evidence introduced at trial had been obtained improperly."

The unpublished opinion, filed September 19, 1983, in case No. 82-1954 did not mention the point.

On October 3, 1983, Blinder, Robinson filed a motion to consolidate the appeals in No. 82-1954, the enforcement action, and in No. 83-2041, the injunction action. On November 16, 1983, the court denied the motion to consolidate.

On January 16, 1984, Blinder, Robinson filed in the enforcement action a motion for relief under Rule 60 (b)(6). On April 3, 1984, the district court denied the motion saying, R. 135:

> "The defendants' principal contention is that the trial of this enforcement action was tainted by evidence obtained unlawfully in an administrative investigation and that the defendants' trial counsel failed to raise a sufficient challenge to that evidence because of gross negligence. There is no merit in the motion. Even a cursory review of the record in this case and in Civil Action No. 80-M-1067 [the injunction suit] will reveal that the defendants were vigorously represented by competent and experienced lawyers who made a tactical decision which binds their clients."

Our appeal in No. 84-1483 is from this denial of Rule 60(b) relief.

The trial of the enforcement action was July 6-14, 1981. At the trial counsel for Blinder, Robinson did not object to the introduction of evidence obtained through the investigatory order. R. 5-6. Blinder, Robinson says R. 7-8:

> "The insistence of the former trial counsel for Blinder to attack the introduction of tainted evidence 'collaterally' in the Injunctive Action rather than 'directly' in the Enforcement Action amounted to ineffective and grossly negligent assistance of counsel."

In *Aune v. Reynders*, 10 Cir., 1965, 344 F.2d 835, 841, we said:

> "In ordinary civil cases the rule is that after an appeal has been taken the district court retains jurisdiction to consider and deny a Rule 60(b) motion and, if it indicates that it will grant the motion, the movant may then ask the Court of Appeals to remand the case so that the district court may act."

See also *United States v. 397.51 Acres of Land*, 10 Cir. 1982, 692 F.2d 688, 693. A Rule 60(b) motion is an extraordinary procedure which may be granted in a showing of due cause. *Brown v. McCormick*, 10 Cir., 1979, 608 F.2d 410, 413.

Even assuming that Blinder, Robinson's attorney's failure to object to the allegedly improper evidence was due solely to the negligence of their counsel rather than to deliberate litigation strategy, this would not constitute a sufficient showing to warrant the extraordinary relief sought. As said in *Link v. Wabash Railroad Co.*, 370 U.S. 626, 634, n. 10, 82 S.Ct. 1386, 1390, n. 10, 8 L.Ed.2d 734:

> "[K]eeping this suit alive merely because plaintiff should not be penalized for the omissions of his own

attorney would be visiting the sins of plaintiff's lawyer upon the *defendant.*" [Emphasis in original.]

The Supreme Court has said, *Ackermann v. United States*, 340 U.S. 193, 198, 71 S.Ct. 209, 211-12, 95 L.Ed. 207: "There must be an end to litigation someday, and free, calculated, deliberate choices are not to be relieved from."

We agree with the district court that Blinder, Robinson was represented in the Enforcement Action by competent and experienced lawyers who made a tactical decision which binds their clients. The Rule 60(b) motion was properly overruled.

By letters dated August 1, 1984 and November 6, 1984, Blinder, Robinson has directed our attention to an "Order for Public Proceedings and Notice of Hearing Pursuant to Sections 15(b) and 19(h) of the Securities Exchange Act of 1934, as amended," directed against it. In connection with that proceeding an Administrative Law Judge has denied a Blinder, Robinson motion for discovery. Any errors in that proceeding will be subject to judicial review. They may not be considered in this proceeding.

The motion filed August 6, 1984, to consolidate these cases with No. 82-1954 is denied.

The judgments in Nos. 83-2041 and 84-1483 are severally affirmed.

UNITED STATES DISTRICT COURT
D. COLORADO

Civ. A. No. 80-M-1067

BLINDER, ROBINSON & CO., INC., and MEYER BLINDER,
Plaintiffs,

v.

UNITED STATES SECURITIES AND EXCHANGE COMMISSION, THE UNITED STATES OF AMERICA, and UNNAMED OFFICERS AND AGENTS,
Defendants.

June 8, 1983

MEMORANDUM OPINION AND ORDER FOR SUMMARY JUDGMENT OF DISMISSAL

MATSCH, District Judge.

This is an action seeking damages, declaratory and injunctive relief arising from an investigation conducted by the Securities and Exchange Commission pursuant to an Order Directing Private Investigation, issued August 3, 1978. Jurisdiction is asserted under 15 U.S.C. §§ 77v (a), 78aa and 28 U.S.C. §§ 1331, 1346. The material facts are undisputed.

Blinder, Robinson and Co., Inc. ("Blinder, Robinson") is a broker-dealer registered with the Securities and Exchange Commission ("SEC") pursuant to Section 15(b) of the Securities Exchange Act, 15 U.S.C. § 78o(b). Meyer Blinder is the president, chairman of the board

and majority shareholder of Blinder, Robinson. On August 3, 1978, the SEC issued an Order Directing Private Investigation of Blinder, Robinson ("the Order"), authorizing inquiry into possible violations of the registration and antifraud provisions of the federal securities laws.

On August 15, 1980, Blinder, Robinson filed the complaint which initiated the instant action, alleging that the 1978 Order violated Section 20(a) of the Securities Act, Section 21(a) of the Securities Exchange Act and the Fourth Amendment to the United States Constitution.[1] A motion for temporary restraining order was called for hearing on August 19, 1980, at which time counsel for the defendant advised that the outstanding subpoenas had been "adjourned." On August 27, 1980, the SEC filed a civil enforcement action against Blinder, Robinson, Meyer Blinder and others, seeking injunctions against violations of the federal securities laws. On September 18, 1980, the Commission moved to dismiss the instant action as moot, asserting that the filing of the civil enforcement action had effectively concluded the SEC investigation.

On October 1, 1980, Blinder, Robinson amended its complaint, seeking (1) a declaratory judgment that the 1978 Order was invalid, and, (2) an injunction restraining the Commission from using any information gathered pursuant to that order in any action against Blinder, Robinson. On October 6, 1980, a hearing on the Commission's motion to dismiss was held. The following day, this court dismissed the action as moot, noting that challenges to the Order could be effectively, and more appro-

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[1] It was contended that the Order lacked the requisite statutory determination that an investigation is necessary to determine whether "any person has violated, is violating, or is about to violate" the federal securities laws, *see e.g.* 15 U.S.C. § 78u(a), and that the grant of such "unlimited power for an unlimited period of time" constituted a violation of the plaintiffs' Fourth Amendment rights.

priately, pursued in the context of the pending enforcement proceeding.

The enforcement action proceeded to trial on July 6-14, 1981. At no time did the defendants there, Blinder, Robinson or Meyer Blinder, seek to suppress or otherwise object to the introduction of evidence derived from the "tainted" investigation.[2] On June 8, 1982, this court entered judgment against Blinder, Robinson and Meyer Blinder, finding that they had violated Section 17(a) of the Securities Act, Sections 10(b) and 15(c) of the Securities Exchange Act and Rules 10b-5, 10b-6, 10b-9 and 15c2-4 promulgated thereunder. *SEC v. Blinder, Robinson & Co., Inc., et al.*, 542 F.Supp. 468 (D.Colo. 1982). An appeal of this judgment is presently pending. *SEC v. Blinder, Robinson, Inc., et al.*, No. 82-1954, (notice of appeal filed August 6, 1982).

On October 27, 1982, the Tenth Circuit Court of Appeals, after declining to consider the pending appeal of the civil enforcement proceeding, reversed the dismissal of the instant action, holding that, so long as the 1978 Order remained in effect,[3] the Commission could resume its investigation "within the four corners of its outstanding investigative order." *Blinder, Robinson & Co. v. SEC*, 692 F.2d 102, 106 (10th Cir. 1982).

On January 10, 1983, Blinder, Robinson filed a second amended complaint, joined by Meyer Blinder as an additional plaintiff, asserting three claims for relief from the Commission and unknown officers and agents. The first

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[2] Blinder, Robinson did file an amended answer raising, as the Eighth Affirmative Defense, the illegal and unconstitutional nature of the SEC investigation and asserting that the Commision "is barred, estopped and precluded from bringing this action and/or seeking relief against the defendants." No objection to the SEC evidence was based on that contention.

[3] In an affidavit filed February 11, 1983, the Chief Counsel of the Division of Enforcement asserted that he formally terminated the 1978 Order on September 9, 1982.

claim seeks a permanent injunction preventing the Commission and its employees "from utilizing a formal order of investigation in violation of Plaintiffs' Fourth Amendment rights and Fifth Amendment due process rights." The second claim requests a declaration that the 1978 Order "was an invalid exercise of the Commission's statutory authority and was applied by staff members designated with subpoena power in an unconstitutional manner in violation of Plaintiffs' Fourth Amendment rights." The third claim asks for damages as a consequence of the acts and conduct of the defendants which "violated Plaintiffs' rights including their right to privacy and the right to be free from wrongful intrusions, as found under the Constitution of the United States, the Constitution of Colorado and common law."

The SEC moved for a summary judgment of dismissal of all three claims, asserting, inter alia, that the plaintiffs are barred by collateral estoppel from "relitigating issues concerning the lawfulness of the Commission's investigation," and asserting a lack of subject matter jurisdiction and a lack of standing as well as immunity from damages.

"The doctrine of collateral estoppel provides that once a court has actually decided an issue of fact or law necessary to its judgment, the decision precludes relitigation of the issue in a subsequent suit on a different cause of action involving a party of the prior litigation." *Searing v. Hayes*, 684 F.2d 694, 696 (10th Cir. 1982) (citing *Montana v. United States*, 440 U.S. 147, 99 S.Ct. 970, 59 L.Ed.2d 210 (1979)). *See also Lujan v. United States Dept. of Interior*, 673 F.2d 1165 (10th Cir. 1982), *cert. denied*, —— U.S. ——, 103 S.Ct. 297, 74 L.Ed.2d 279 (1982); *Brown v. DeLayo*, 498 F.2d 1173 (10th Cir. 1974). It is well settled that this common law doctrine of issue preclusion is generally applicable to constitutionally based civil rights claims. *See e.g. Allen v. McCurry*, 449 U.S. 90, 101 S.Ct. 411, 66 L.Ed.2d 308 (1980) (§ 1983

claim based on unreasonable search and seizure); *Searing v. Hayes, supra* (same).

The collateral estoppel doctrine has been held to bar a subsequent civil action challenging the constitutional sufficiency of a Fourth Amendment search where, in a prior criminal action, the issue of suppression had been raised by the defendant and decided adversely to him. *Allen v. McCurry, supra*; *Searing v. Hayes, supra*; *Smith v. Sinclair*, 424 F.Supp. 1108 (W.D.Okl. 1976); *Pyles v. Keane*, 418 F.Supp. 269 (S.D.N.Y. 1976). Moreover, preclusive estoppel effect, both as to the elements of the crime charged as well as to the constitutionality of an underlying search, has been held to arise from a defendant's guilty plea, notwithstanding the lack of actual litigation of the critical issues *Ivers v. United States*, 581 F.2d 1362 (9th Cir. 1978) (elements of the crime); *Brazzell v. Adams*, 493 F.2d 489 (5th Cir. 1974) (same); *Metros v. United States District Court for District of Colorado*, 441 F.2d 313 (10th Cir. 1971) (illegal search); *Hooper v. Guthrie*, 390 F.Supp. 1327 (W.D.Pa. 1975) (illegal search); *Palma v. Powers*, 295 F.Supp. 924 (N.D.Ill. 1969) (illegal search).

The question in this case is whether the findings of fact, conclusions of law and judgment in the civil enforcement proceeding, resulting from evidence derived from the use of the challenged investigatory order, precludes the defendants in that proceeding from pursuing these claims attacking the constitutional and statutory sufficiency of the investigatory activities in a separate civil proceeding brought by them as plaintiffs. The answer is yes.

The plaintiffs contend that the Commission prevented their challenge to the lawfulness of the investigation by declining to permit consolidation of this case with the civil enforcement action. This contention is without merit. It is undisputed that the legality of the Commission investigation could have been challenged in the en-

forcement proceeding by a motion to suppress evidence, or by objections to the introduction of the evidence derived from the Commission's investigatory actions. It is apparent that the defendants, now plaintiffs, were aware of the source and significance of the "tainted" evidence used in the enforcement action. Accordingly, the plaintiffs, by their knowing inaction, waived any challenge to the legal sufficiency of the investigation. *See Cramer v. Crutchfield*, 648 F.2d 943, 945 (4th Cir. 1981); *Metros v. United States District Court for Dist. of Colorado, supra*; *Hooper v. Guthrie, supra*; *Palma v. Powers, supra. See also Lujan v. United States Dept. of Interior, supra*, at 1168-1169; *Prosise v. Haring*, 667 F.2d 1133, 1138 n. 3 (4th Cir. 1981), *cert. granted*, —— U.S. ——, 103 S.Ct. 205, 74 L.Ed.2d 164 (1982); *Williams v. Liberty*, 461 F.2d 325, 328 (7th Cir. 1972).

This result meets the general requirement that, to apply the collateral estoppel doctrine, the party against whom the earlier decision is asserted must have had a "full and fair opportunity" to litigate the issue. *Allen v. McCurry, supra*, 449 U.S. at 95, 101 S.Ct. at 415; *Montana v. United States, supra*, 440 U.S. at 153, 99 S.Ct. at 973; *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313, 328-329, 91 S.Ct. 1434, 1442-1443, 28 L.Ed.2d 788 (1971). This inquiry turns not on whether the party actually litigated the issue, but rather whether the party had the *incentive and opportunity* to do so. *See* Vestel, *The Restatement (Second) of Judgments: A Modest Dissent*, 66 Cornell L.Rev. 464, 468-470 (1981). The plaintiffs here, as defendants there, had ample opportunity, in the context of the enforcement proceeding, to contest the legality of the SEC investigation. They had every incentive to litigate the issue of investigatory validity "fully and vigorously." *See Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 332, 99 S.Ct. 645, 652, 58 L.Ed.2d 552 (1979). They should not now be heard to assert that, due to their knowing inac-

tion, the issue was not decided for purposes of collateral estoppel.[4]

The plaintiffs assert, however, that the monetary, injunctive and declaratory relief instantly sought involves issues which could not have been determined in the prior enforcement proceeding. "Plaintiffs therefore have never had a 'full and fair opportunity' to litigate those issues." This contention, however, misconstrues the nature of the collateral estoppel doctrine. No contention is made that all issues were "decided" in the enforcement proceeding. Rather, only the fundamental issue of the lawfulness of the Commissions' investigation was necessarily, and conclusively, determined. That determination, however, precludes pursuit of the instant claims for relief which, as framed in the pleadings, are predicated solely on the illegality of the SEC action. Accordingly, the defendants are entitled to a dismissal of these claims for relief.

Upon the foregoing, it is

ORDERED, that the defendants' motion for summary judgment of dismissal is granted and this civil action is dismissed with prejudice and the defendants may recover their costs to be taxed upon the filing of a bill of costs within ten days from the entry of judgment.

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[4] One court has noted that, at best, a litigant who has once foregone his opportunity to contest a significant matter in a prior proceeding should "have the burden of explaining his failure to controvert the matter . . ." *Palma v. Powers, supra,* at 936. The instant plaintiffs, however, have proffered no explanation for their failure to attack the legality of the investigation in the prior enforcement proceeding.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 80-M-1125

SECURITIES AND EXCHANGE COMMISSION,
Plaintiff,

v.

BLINDER, ROBINSON & CO., INC. and MEYER BLINDER,
Defendants.

[Filed Apr. 3, 1984]

ORDER DENYING RULE 60(b) MOTION

Judgment was entered in this matter on June 8, 1982 and affirmed on appeal on September 19, 1983. The defendants, by a motion filed January 16, 1984, seek to vacate that judgment and grant a new trial under F.R. Civ.P. 60(b)(6). The Securities and Exchange Commission filed an opposition to the motion on January 26, 1984.

The defendants' principal contention is that the trial of this enforcement action was tainted by evidence obtained unlawfully in an administrative investigation and that the defendants' trial counsel failed to raise a sufficient challenge to that evidence because of gross negligence. There is no merit in this motion. Even a cursory review of the record in this case and in Civil Action No. 80-M-1067 will reveal that the defendants were vigorously represented by competent and experienced lawyers who made a tactical decision which binds their clients. Accordingly, it is

ORDERED, that the motion is denied.

Dated: April 3, 1984

BY THE COURT:

/s/ Richard P. Matsch
RICHARD P. MATSCH
Judge

UNITED STATES OF AMERICA
BEFORE THE
SECURITIES AND EXCHANGE COMMISSION

(D-1630)

IN THE MATTER OF
BLINDER, ROBINSON & CO., INC.

[Aug. 3, 1978]

ORDER DIRECTING PRIVATE INVESTIGATION AND DESIGNATING OFFICERS TO TAKE TESTIMONY

I.

The Commission's public official files disclose that Blinder, Robinson & Co., Inc., is a broker and dealer in securities and registered as such with the Commission pursuant to Section 15(b) of the Securities Exchange Act of 1934, as amended.

II.

Members of its staff have reported information to the Commission which tends to show that:

A. Blinder, Robinson & Co., Inc. and others have been offering to sell, selling, offering to purchase and purchasing new issues of securities of highly speculative, recently organized issuers.

B. While engaged in the offer, sale and purchase of such securities, such persons made to purchasers, prospective purchasers, sellers and prospective sellers untrue statements of material facts and omitted to state material facts necessary to make the statements made, in light of the circumstances under which they were made, not misleading, concerning among other things:

1. The true number of shares initially offered to the public at the offering price stated in the respective offering circulars and prospectuses relating to such issues.

2. The total cash paid by the public for such new securities issues.

3. The profits derived by Blinder and others in the placement of such new securities issues with the public.

4. The demand for such new securities issues.

5. The restricted supply of securities available to the public in such new securities issues.

C. While engaged in the offer, sale and delivery of such securities, such persons directly and indirectly, made use of the mails and instruments of transportation and communication in interstate commerce and of the means and instrumentalities of interstate commerce.

III.

The Commission, having considered the staff report and deeming such acts and practices, if true, to be in possible violation of Sections 5(a), 5(c) and 17(a) of the Securities Act of 1933, as amended, Section 10 of the Securities Exchange Act of 1934, as amended, and Rule 10b-5 thereof, find it necessary and appropriate and hereby

ORDERS, pursuant to the provisions of Section 20(a) of the Securities Act of 1933 and Section 21(a) of the Securities Exchange Act of 1934, that a private investigation be made to determine whether the aforesaid persons or any other persons have engaged or are about to engage

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This order directing a private investigation has been furnished to Gregory Kellam Scott at his request, pursuant to Rule 7(a) of the Commission's Rules Relating to Investigations and it [sic]

in any of the reported acts or practices or in any acts or practices of similar purport or object; and

IT IS FURTHER ORDERED, pursuant to the provisions of Section 19(b) of the Securities Act of 1933 and Section 21(b) of the Securities Exchange Act of 1934, that for the purposes of such investigation Robert H. Davenport, Joseph F. Krys, Thomas E. Boyle, Harold M. Golz, Gregory C. Tevis, Everett L. J. Smith, and each of them, is hereby designated an officer of this Commission and empowered to administer oaths and affirmations, subpoena witnesses, compel their attendance, take evidence and require production of any books, papers, correspondence, memoranda or other records deemed relevant and material to the inquiry, and to perform all other duties in connection therewith as prescribed by law.

By the Commission.

/s/ George A. Fitzsimmons
GEORGE A. FITZSIMMONS
Secretary

Administrative Proceeding
File No. 3-6380

UNITED STATES OF AMERICA
BEFORE THE
SECURITIES AND EXCHANGE COMMISSION

(8-15727)

IN THE MATTER OF
BLINDER, ROBINSON & CO., INC.
MEYER BLINDER

[Jun. 27, 1984]

ORDER FOR PUBLIC PROCEEDINGS AND NOTICE OF HEARING PURSUANT TO SECTIONS 15(b) AND 19(h) OF THE SECURITIES EXCHANGE ACT OF 1934, AS AMENDED

I.

The Commission's public official files disclose that:

A. Blinder, Robinson & Co., Inc. ("Registrant"), a New York corporation having offices in Englewood, Colorado and elsewhere, became registered with the Commission on April 22, 1970 as a broker-dealer pursuant to Section 15(b) of the Securities Exchange Act of 1934, as amended ("Exchange Act") and is still so registered.

B. Registrant is a member of the National Association of Securities Dealers, ("NASD"), a national securities association registered pursuant to Section 15A of the Exchange Act, and has been at all times pertinent hereto.

C. Meyer Blinder ("Blinder"), Pompano Beach, Florida, has been the president and a director of Registrant since its inception and directly and indirectly is the bene-

ficial owner of more than 25% of Registrant's outstanding common stock.

D. American Leisure Corp. ("American Leisure"), a New Jersey corporation engaged in the business of constructing and operating a casino in Atlantic City, New Jersey, filed an S-1 Registration Statement with the Commission which became effective on or about December 26, 1979. Commencing on or about that date, American Leisure made a public offering of 10,000,000 units of its securities at a price of $2.50 per unit on a "Best Efforts, All or None Basis." Each unit consisted of one share of common stock, one "A" warrant and one "B" warrant. Registrant was the underwriter for the American Leisure offering.

II.

As a result of an investigation, the Division of Enforcement alleges that:

A. On June 8, 1982, a Judgment of Permanent Injunction was entered by the U.S. District Court for the District of Colorado against Registrant and Blinder enjoining them from future violations of Section 17(a) of the Securities Act of 1933, as amended ("Securities Act"), and Sections 10(b) and 15(c) of the Exchange Act and Rules 10b-5, 10b-6, 10b-9 and 15c2-4 promulgated thereunder.

B. During the period from on or about December 26, 1979 to on or about August 28, 1980, Registrant and Blinder willfully violated Section 17(a)(1) of the Securities Act in that, in the offer and sale of certain securities, namely the units, common stock and warrants of American Leisure, by use of the means and instruments of transportation and communication in interstate commerce and by use of the mails, they directly and indirectly employed devices, schemes and artifices to defraud. As part of the aforesaid conduct, said persons would and did, among other things:

1. Practice a program of deliberately deceptive misinformation, as more fully described in subparagraphs II. B. 6. through II. B. 9., below;

2. Purchase American Leisure securities to create the pretense that all 10,000,000 units of said American Leisure offering had been sold to the public on or before the March 25, 1980 deadline;

3. Use proceeds from said American Leisure offering as an accomodation for loans to finance purchases of American Leisure securities by others to create the pretense that all 10,000,000 units of said offering had been sold on or before the March 25, 1980 deadline;

4. Cause Registrant's underwriting commission to be disbursed from the bank escrow account for said offering prior to the deposit of $25,000,000 in offering proceeds into said account contrary to the "all or none" contingency;

5. Continue the distribution to the public of said American Leisure securities after the announced completion of the distribution;

6. Make statements to customers that the hotel-casino development planned by American Leisure would be assured because of deals that were being made when, in fact, no deals were being made;

7. Make predictions to customers that the price of the aforesaid American Leisure securities would open at a premium in the aftermarket, without a reasonable basis in fact for such predictions;

8. Make statements to customers that Blinder Robinson personnel had inside information about developments positively affecting American Leisure when in fact there were no such positive developments;

9. Omit to state the following material facts, among others, necessary in order to make the state-

ments made, in the light of the circumstances under which they were made, not misleading:

a. American Leisure and Cavanagh Communities Corp. ("CCC"), which own neighboring parcels of land in Atlantic City, New Jersey had preliminary, tentative discussions concerning joint development of their properties but no agreements or preliminary undertakings resulted from those discussions and those discussions have been terminated;

b. Registrant itself would purchase 956,393 American Leisure units during said American Leisure offering;

c. $3,000,000 of the proceeds of said American Leisure offering had been committed to be used as an accommodation for the bank loan necessary for Scope, Inc.,'s purchase of 600,000 American Leisure units with half of the $3,000,000 invested in a certificate of deposit at six (6) points below the market rate;

4. Metrobank, escrow agent for the said American Leisure offering, was so anxious to assist its good customer, the Registrant, that it found it expedient to make a $700,000 loan to a person who had no prior banking connection there to enable him to purchase 400,0000 units in the American Leisure public offering;

e. Metrobank loaned Registrant almost the full amount of its commission to finance its purchase of 956,393 American Leisure units with Metrobank paying itself off from that commission in immediate distribution of the escrow account;

f. Registrant would place the 956,393 American Leisure units it would purchase in said offering in its inventory account to participate in aftermarket transactions; and

g. Even though all the 10,000,000 units publicly offered by American Leisure had not been sold to the public in *bona fide* transactions by the March 25, 1980 deadline, investors' monies would not be returned to them contrary to the "all or none" contingency of said offering.

C. During the period from on or about December 26, 1979 to on or about August 28, 1980, Registrant and Blinder willfully violated Sections 17(a) (2) and 17(a) (3) of the Securities Act in that, in the offer and sale of certain securities, namely the units, common stock and warrants of American Leisure, by use of the means and instruments of transportation and communication in interstate commerce and by use of the mails, they directly and indirectly, obtained money and property by means of untrue statements of material facts and omissions to state material facts necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, and engaged in transactions, practices and a course of business which would and did operate as a fraud and deceit upon the purchasers of such securities. As a part of the aforesaid conduct, said persons, among other things, would and did engage in the acts and practices described in paragraph II. B., above.

D. During the period from on or about December 26, 1979 to on or about August 28, 1980, Registrant and Blinder willfully violated Section 10(b) of the Exchange Act and Rule 10b-5 thereunder in that, in connection with the purchase and sale of certain securities, namely, units, common stock and warrants of American Leisure, by use of the means and instrumentalities of interstate commerce and, by use of the mails, they directly or indirectly employed devices, schemes, and artifices to defraud, made untrue statements of material facts and omitted to state material facts necessary in order to make the statements made, in light of the circumstances under which

they were made, not misleading; and engaged in acts, practices and a course of business which would and did operate as a fraud and deceit. As part of the aforesaid conduct, said persons, among other things, would and did engage in the acts and practices described in paragraph II B., above.

E. From on or about December 26, 1979 to on or about August 28, 1980, Registrant and Blinder willfully violated Section 10(b) of the Exchange Act and Rule 10b-6 thereunder in that they used, in connection with the purchase and sale of securities, manipulative and deceptive devices and contrivances, and in connection therewith Registrant and Blinder, who were underwriters in a distribution of units, common stock and warrants of American Leisure, directly and indirectly, by the use of means and instrumentalities of interstate commerce, and of the mails, with one or more other persons, bid for and purchased for accounts in which they had a beneficial interest, and induced others to buy, said American Leisure securities which were the subject of such distribution, prior to the completion of the participation of Registrant and Blinder in such distribution.

F. During the period from on or about December 26, 1979 to on or about August 28, 1980, Registrant and Blinder willfully violated Section 10(b) of the Exchange Act and Rule 10b-9 promulgated thereunder in that they used, in connection with the purchase and sale of certain securities, namely, the units, common stock and warrants of American Leisure, manipulative and deceptive devices and contrivances, and in connection therewith, Registrant and Blinder, directly and indirectly, by the use of the means and instrumentalities of interstate commerce, and of the mails, represented that the said securities of American Leisure were being offered and sold to the public on an "all or none" basis when, in fact (1) less than all the securities offered had been sold within the specified time; (2) less than all the proceeds due the

seller had been received within the specified time; and (3) all the monies were not returned to purchasers in the offering as the prospectus for the said offering represented would be done, all in violation of the aforesaid section and rule.

G. From on or about December 26, 1979 to on or about August 28, 1980, Registrant willfully violated and Blinder willfully aided and abetted violations of Section 15(c) of the Exchange Act and Rule 15c2-4 promulgated thereunder in that Registrant, while participating as an underwriter in a distribution of the units, common stock and warrants of American Leisure on an "all or none" basis with the provision that all sales proceeds would be transmitted to and maintained in a bank escrow account until (1) the entire offering was sold within a specified time, in which event the monies would be disbursed from the escrow account to another escrow account; or (2) the entire offering was not sold within the specified time, in which event the monies would be promptly refunded to the purchasers of the securities, accepted money from sales of such securities even though:

1. Monies were disbursed from the escrow account prior to the occurrence of the "all or none" contingency; and

2. The monies were not promptly refunded to purchasers in the offering even though the offering was not sold within the specified time.

III.

In view of the allegations made by the Division of Enforcement, the Commission deems it necessary and appropriate in the public interest and for the protection of investors, that public proceedings be instituted to determine:

A. Whether the allegations set forth in Section II hereof are true, and in connection therewith, to afford

Respondents an opportunity to establish any defenses to such allegations; and

B. What, if any, remedial action is appropriate in the public interest pursuant to Sections 15(b) and 19(h) of the Exchange Act.

IV.

IT IS HEREBY ORDERED that a public hearing for the purpose of taking evidence on the questions set forth in Section III hereof be held at a time and place to be fixed and before an Administrative Law Judge to be designated by further Order as provided by Rule 6 of the Commission's Rules of Practice.

IT IS FURTHER ORDERED that the Respondents file an answer to the allegations contained in this Order for Proceedings within fifteen (15) days after service upon them of said Order as provided by Rule 7 of the Commission's Rules of Practice. If the Respondents fail to file an Answer or fail to appear at a hearing after being duly notified, they shall be deemed in default and the proceeding may be determined against them upon consideration of this Order for Proceedings, the allegations of which may be deemed to be true as provided by Rules 6(e) and 7(e) of the Commission's Rules of Practice.

This Order shall be served upon Respondents' Registrant and Blinder personally or by certified mail forthwith.

In the absence of an appropriate waiver, no officer or employee of the Commission engaged in the performance of investigative or prosecuting functions in this or any factually related proceedings will be permitted to participate or advise in the decision upon this matter, except as witness or counsel in proceedings held pursuant to notice. Since this proceeding is not "rule-making" within the meaning of Section 4(c) of the Administrative Procedure Act, it is not deemed subject to the provisions of

that Section delaying the effective date of any final Commission action.

By the Commission.

/s/ George A. Fitzsimmons
GEORGE A. FITZSIMMONS
Secretary

BEFORE THE
SECURITIES AND EXCHANGE COMMISSION

Case No. 3-6380

IN THE MATTER OF:

BLINDER-ROBINSON & COMPANY, INC.,
and MEYER BLINDER,
Respondents.

Division II Courtroom
Federal Courthouse
Denver, Colorado
Tuesday, October 16, 1984

The above entitled-matter came on for pretrial conference at 12:00 noon, October 16, 1984.

A. J. MARKHAM, Administrative Law Judge

APPEARANCES:

For the Securities and Exchange Commission:

RODNEY VINCENT
THOMAS AMY
DON HOERL

For the Respondents:

ARTHUR F. MATHEWS
ANDREW B. WEISSMAN
ALAN JACOBSON

* * * *

[1-39] JUDGE MARKHAM: All right. Well, my ruling will be then, and my ruling is, that the application of collateral estoppel will preclude your asserting the

illegality defense, and I'll not receive evidence on that point and I will decline to issue the subpoenaes that you requested.

That is my primary basis for it.

Secondarily, I do, as I've indicated in my line of questions that I've put here, I do have some question as to whether the Commission in fact, even assuming there had been no collateral estoppel question here, that the first thing the Commission had done was simply to order this administrative proceedings based on the investigative order. And you had raised that question for first time.

I would still have some question as to whether it is the Commission's intention to permit me to go into that kind of an inquiry involving, as it would, an inquiry into perhaps even the thought processes of the Commission in determining what they had in mind when they issued their order for investigation, what they had in mind as to the [1-40] duration of it, and how long it would be valid, and so on and so forth.

So I do have some questions on that.

But the specific basis for my ruling in this case is that there has been collateral estoppel, in that Respondents have had their day in court on that issue, they have —they chose in that particular case not to raise that defense, and they are estopped from raising it here now.

* * * *

Administrative Proceeding
File No. 3-6380

UNITED STATES OF AMERICA
BEFORE THE
SECURITIES AND EXCHANGE COMMISSION
DECEMBER 4, 1984

(8-15727)

IN THE MATTER OF

BLINDER, ROBINSON & CO., INC.
6455 South Yosemite Street
Englewood, Colorado

MEYER BLINDER

ORDER AFFIRMING RULING OF ADMINISTRATIVE LAW JUDGE DENYING DISCOVERY

I.

Respondents Blinder, Robinson & Co., Inc. ("registrant"), a registered broker-dealer, and Meyer B[l]inder, its president, appeal from the ruling of an administrative law judge denying their request for discovery. Respondents seek to obtain "all documents or other materials within [our] possession, custody or control . . . that relate to the following:

> "(1) [Our] issuance of the formal order of investigation that formed the basis for the investigatory activities of the Division of Enforcement which led to this proceeding;
>
> "(2) The scope of the investigation conducted by the Division of Enforcement pursuant to that formal order; and

"(3) [Our] eventual institution of these proceedings based on that investigation."

II.

The pertinent facts are as follows. On August 3, 1978, we issued a formal order authorizing our staff to conduct a private investigation to determine whether registrant and others were violating antifraud provisions of the securities acts in connection with the purchase, offer and sale of new securities issues of highly speculative, recently organized issuers.[1] On June 27, 1984, we instituted these proceedings based, among other things, on allegations that, during the period December 26, 1979 to August 28, 1980, respondents violated antifraud provisions in connection with registrant's underwriting of a "best efforts, all or none" offering of 10,000,000 units of American Leisure Corp.

Respondents point out (1) that our formal order of investigation authorized our staff to investigate whether registrant or other persons had "engaged or [were] about to engage" in certain unlawful activities, and (2) that all of the allegations in the order for proceedings relate to a period more than a year after the order of investigation was issued. They accordingly contend that the charges against them were not covered by the order of investigation and, therefore, that much of that investigation was unauthorized. Respondents argue that the discovery they seek will enable them to uncover evidence relating to the unlawful nature of the investigation, with the ultimate objective of using such evidence as a basis for dismissing these proceedings on grounds of prosecutorial misconduct.

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[1] *See* Section 21(a) of the Securities Exchange Act and 17 CFR 202.5(a). Our order authorized an investigation of "the reported acts or practices" and "any acts or practices of similar purport or object."

III.

As the law judge pointed out, Rule 8(d) of our Rules of Practice, pursuant to which respondents filed their motion, does not authorize the discovery that they seek.[2] Nor are respondents entitled to such materials as matter of due process.[3]

In addition, as we have previously made clear, with certain exceptions not relevant here investigative materials are confidential.[4] While a clearly demonstrated need may prevail over the confidentiality of such matters, the claimant "must make a showing . . . sufficient to outweigh the adverse effects [that] production would engender." [5] We do not consider that such a showing was made here. Congress has endowed this Commission with broad powers to conduct investigations.[6] And it does not appear that our staff exceeded the legitimate scope of the inquiry that we authorized.[7]

---

[2] That rule merely provides that, in his discretion, the hearing officer may order a party to furnish an outline of its case or defense; the legal theories upon which it will rely; the identity of its witnesses; and copies of or a list of the documents it intends to introduce into evidence.

[3] *See Miner* v. *Atlass*, 363 U.S. 641 (1960); *NLRB* v. *Interboro Contractors, Inc.*, 432 F.2d 854, 857-858 (2d Cir. 1970), *cert. denied*, 402 U.S. 915 (1971).

[4] *See, e.g., Haight & Company, Inc.*, 44 S.E.C. 481, 510-511 (1971), *aff'd without opinion* (D.C. Cir., June 30, 1971), *cert. denied*, 404 U.S. 1058 (1972). *See also* Rule 0-4 under the Securities Exchange Act.

[5] *Black* v. *Sheraton Corp. of America*, 564 F.2d 531, 545 (D.C. Cir. 1977).

[6] *See, e.g., SEC* v. *Arthur Young & Company*, 584 F.2d 1018, 1023 (D.C. Cir. 1978).

[7] We do not interpret the terms "about to engage" in our investigative order and "about to violate" in Section 21(a) of the Exchange Act and our rule thereunder as narrowly as movants would construe those phrases. *Cf. SEC* v. *Culpepper*, 270 F.2d 241, 249-

Accordingly, IT IS ORDERED that the ruling of the administrative law judge denying respondents' motion for discovery be, and it hereby is, affirmed.

By the Commission.

/s/ Shirley E. Hollis
SHIRLEY E. HOLLIS
Acting Secretary

---

250 (2d Cir. 1959); *SEC* v. *Management Dynamics, Inc.*, 515 F.2d 801, 807 (2d Cir. 1975). Even assuming that some impropriety occurred, complaining parties have means available to raise such allegations, including a request that this Commission's Counsel for Professional Responsibility/Ethics Counsel conduct an internal investigation of the matter. *See* 17 CFR 200.21a.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment IV to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment V to the United States Constitution provides in pertinent part:

> No person shall be . . . deprived of life, liberty, or property, without due process of law.

Amendment VI to the United States Constitution provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence.

Section 20(b) of the Securities Act of 1933, 15 U.S.C. § 77t(b), provides in pertinent part:

> § 77t. *Injunctions and prosecutions of offenses*
>
> (b) Whenever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this title, or of any rule or regulation prescribed under authority thereof, it may in its discretion, bring an action in any district court of the United States, United States court of any Territory, or the District Court of the United States for the District of Columbia to enjoin such acts or practices, and upon a proper showing a permanent or temporary injunction or restraining order shall be granted without bond.

Section 21(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78u(a), provides in pertinent part:

§ 78u. Investigations and actions

Authority and discretion of Commission to investigate violations

(a) The Commission may, in its discretion, make such investigations as it deems necessary to determine whether any person has violated, is violating, or is about to violate any provision of this chapter, [or] the rules or regulations thereunder . . . .

Rule 60(b) of the Federal Rules of Civil Procedure provides:

Rule 60. Relief from Judgment or Order

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

SUPREME COURT, U.S.
WASHINGTON, D.C. 20543

FILED
MAY 3 1985
ALEXANDER L. STEVAS
CLERK

No. 84-1563

In the Supreme Court of the United States

OCTOBER TERM, 1984

BLINDER, ROBINSON & CO. INC. AND
MEYER BLINDER, PETITIONERS

v.

SECURITIES AND EXCHANGE COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

REX E. LEE
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QUESTIONS PRESENTED

1. Whether petitioners' claims for injunctive and declaratory relief challenging a formal administrative order of investigation became moot when the order was terminated.

2. Whether the district court abused its discretion in denying petitioners' motion for relief from judgment under Fed. R. Civ. P. 60(b)(6).

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In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-1563

BLINDER, ROBINSON & CO. INC. AND
MEYER BLINDER, PETITIONERS

v.

SECURITIES AND EXCHANGE COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 748 F.2d 1415. The opinion of the district court and order granting summary judgment (Pet. App. 12a-18a) are reported at 565 F. Supp. 74. The order of the district court denying petitioners' motion under Fed. R. Civ. P. 60(b)(6) (Pet. App. 19a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 27, 1984. A petition for rehearing was denied on January 2, 1985. The petition for a writ of certiorari was filed on April 2, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner Blinder, Robinson & Company (Blinder, Robinson) is a broker-dealer registered with the Securities and Exchange Commission. Petitioner Meyer Blinder is Blinder, Robinson's president and principal shareholder. Pet. App. 12a-13a. On August 27, 1980, the Commission brought a civil enforcement action in the United States District Court for the District of Colorado, charging that petitioners and others had violated antifraud and anti-manipulation provisions of the Securities Act of 1933 and the Securities Exchange Act of 1934 and regulations thereunder in connection with a $25 million public offering of securities of American Leisure Corporation, a new issuer with no operating history (Pet. App. 2a).[1] In their answer to the Commission's complaint, petitioners alleged as an affirmative defense that the Commission's case resulted from an illegal investigation (*id.* at 14a n.2). The Commission's enforcement action was tried in July 1981 (*id.* at 14a). Petitioners did not seek to introduce any evidence relating to their purported illegality defense, nor did they object to the Commission's introduction of any evidence derived from its investigation (*id.* at 3a, 14a).

The district court found that petitioners had violated each of the charged provisions and enjoined them from further violations. The court of appeals affirmed in all respects, and this Court denied certiorari. 542 F. Supp. 468 (D. Colo. 1982), aff'd, 748 F.2d 1415 (10th Cir. 1984), cert. denied, No. 84-649 (Jan. 7, 1985).

---

[1]The complaint charged violations of the following provisions: Section 17(a) of the Securities Act of 1933, 15 U.S.C. 77q(a); Sections 10(b), 15(c) of the Securities Exchange Act of 1934, 15 U.S.C. 78j(b), 78*o*(c); and Rules 10b-5, 10b-6, 10b-9, 15c2-4, 17 C.F.R. 240.10b-5, 240.10b-6, 240.10b-9, 240.15c2-4.

2. Twelve days before the Commission brought its enforcement action, Blinder, Robinson filed suit against the Commission in the same district court, challenging the agency's formal order of investigation that led to the enforcement action. The formal order (Pet. App. 20a-22a) authorized Commission staff to issue subpoenas during the course of their investigation of petitioners, but the order did not itself compel petitioners to disclose any information or to produce any documents. See generally *SEC* v. *Jerry T. O'Brien, Inc.*, No. 83-751 (June 18, 1984), slip op. 1-2 n.1. After the enforcement action was initiated, the district court dismissed Blinder, Robinson's action on the ground that it was moot. See Pet. App. 13a-14a. The court of appeals reversed, concluding that the action was not moot because the order of investigation was still in effect, and remanded to the district court for further proceedings. 692 F.2d 102, 106 (10th Cir. 1982).

On remand, Meyer Blinder joined the action, and petitioners amended their complaint to seek damages from unnamed officers and agents of the Commission as well as an injunction against the Commission's use of unconstitutional formal orders to investigate petitioners and a declaration that the order at issue exceeded the Commission's constitutional and statutory authority (Pet. App. 14a-15a). The district court granted summary judgment in favor of the Commission (*id.* at 12a-18a), reasoning that petitioners were collaterally estopped by their failure to pursue their challenge to the legality of the Commission's investigation in the enforcement action (*id.* at 17a-18a). Petitioners appealed (C.A. No. 83-2041).

3. While their petition for rehearing in the enforcement action was pending in the court of appeals, petitioners moved in the district court under Fed. R. Civ. P. 60(b)(6) for relief from the judgment in that action entered against them 19 months earlier. The sole basis for their motion was

the asserted gross negligence of their counsel in not objecting to the admission of allegedly tainted evidence at trial. The district court denied the motion (Pet. App. 19a). Based on the records of the trial of the enforcement proceeding and petitioners' action against the Commission, the district court concluded that petitioners "were vigorously represented by competent and experienced lawyers who made a tactical decision which binds their clients" (*ibid.*). Petitioners appealed (C.A. No. 84-1483).

4. The court of appeals consolidated the two appeals and affirmed both judgments (Pet. App. 1a-11a).

a. With respect to petitioners' challenge to the Commission's investigation, the court held that their claims for declaratory and injunctive relief had become moot because the formal order of investigation was terminated in September 1982: "[w]hen the investigatory order terminated, there no longer existed a substantial controversy of sufficient immediacy and reality to justify the issuance of a declaratory judgment because the SEC could no longer investigate Blinder, Robinson under that order" (Pet. App. 6a). The court determined (*ibid.* (citation omitted)) that no live controversy exists as to any future investigation of petitioners by the Commission because " 'there is no reasonable expectation that the alleged wrongs will be repeated.' "[2] The court also concluded (*id.* at 7a) that petitioners had not sufficiently stated a claim for damages for alleged constitutional violations by unnamed Commission employees.

b. In affirming the denial of petitioners' Rule 60(b)(6) motion, the court of appeals agreed with the district court

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[2]Contrary to petitioners' characterization (Pet. 3, 10), the formal order has never been adjudicated "illegal"; indeed, when petitioners had the opportunity to seek such an adjudication in the enforcement action, they failed to do so.

that petitioners were bound by the tactical decision of their competent counsel (Pet. App. 11a). The court of appeals reasoned that even if trial counsel had been negligent in failing to object to the Commission's allegedly improper evidence, "this would not constitute a sufficient showing to warrant the extraordinary relief" of setting aside the judgment (*id.* at 10a).

ARGUMENT

The decision of the court of appeals rejecting petitioners' factbound claims is correct and does not conflict with any decision of this Court or any other court of appeals. Petitioners' contentions, which mischaracterize the law and the facts, do not merit further review.

1. The court of appeals correctly applied settled law to the facts of this case in holding (Pet. App. 5a-6a) that petitioners' claims for injunctive and declaratory relief with respect to the Commission's formal order of investigation became moot after the order had been terminated.[3] When the Commission terminated the order in 1982, it was no longer of any effect—the Commission's staff could no longer issue subpoenas or take other investigatory action pursuant to the order. See generally 17 C.F.R. 200.30-4(a)(1), 202.5. Accordingly, an injunction or declaration with respect to the order could not now benefit petitioners —in particular, it could not relieve them of the injunction imposed in the enforcement action, where they raised no

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[3]The court of appeals also correctly affirmed (Pet. App. 7a) the dismissal of petitioners' *Bivens* claim for their failure to plead specific facts supporting a constitutional claim for damages. Petitioners' mere reference (Pet. 13 n.15) to the breadth of the formal order hardly suffices to show its unconstitutionality or the other elements of the cause of action. See generally *Harlow* v. *Fitzgerald*, 457 U.S. 800, 808 (1982); *Butz* v. *Economou*, 438 U.S. 478, 507-508 (1978). Petitioners' conclusory argument to the contrary raises no issue worthy of further review.

objection to the introduction of evidence obtained in the course of the Commission's investigation. In the absence of an immediate, real controversy in which the parties have an actual, personal interest, petitioners' action is moot. See, *e.g., Murphy* v. *Hunt,* 455 U.S. 478, 481-482 (1982); *Ashcroft* v. *Mattis,* 431 U.S. 171, 172 (1977); *Preiser* v. *Newkirk,* 422 U.S. 395, 402 (1975).[4]

This case does not fit within the exception to the requirement of a live controversy for those claims " 'capable of repetition, yet evading review' " (*Murphy* v. *Hunt,* 455 U.S. at 482 (citation omitted)). First, as the court of appeals noted (Pet. App. 5a-6a), any future illegality is unlikely because it is presumed that administrative agencies such as the Commission will act within the law. Moreover, as the court also stated (*id.* at 6a), petitioners have alleged no facts supporting their bare allegation that the Commission will violate their rights in the future. Finally, and most fundamentally, the issue, if it arises in the future, will not evade review. Because the Commission's subpoenas are not self-enforcing (*Jerry T. O'Brien, Inc.,* slip op. 5), petitioners may obtain judicial review by refusing, for good cause, to comply with any subpoena directed to them, thereby forcing the Commission to bring a subpoena enforcement action (see 15 U.S.C. 78u(c)). In such an action, petitioners could challenge the legality of the subpoena and underlying investigation. See generally *Sprecher* v. *Graber,* 716 F.2d 968, 975 (2d Cir. 1983) (subpoena enforcement proceeding is exclusive avenue for testing validity of Commission

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[4]Petitioners recently have sought to challenge the terminated formal order in a Commission administrative proceeding brought pursuant to 15 U.S.C. (& Supp. I) 78*o*(b) based on the injunction entered by the district court in the enforcement action and on the underlying facts (Pet. App. 23a-37a). As the court of appeals noted (*id.* at 11a), petitioners may seek judicial review of any final adverse decision in the administrative proceeding. See 15 U.S.C. 78y(*a*).

subpoena). Indeed, petitioners could have adopted this approach in connection with this very investigation when the Commission issued subpoenas to them. Having failed to assert their claims when there was a live controversy,[5] they have no right to do so now when the issue has been mooted by termination of the challenged order.[6]

This Court's decision in *Haring* v. *Prosise*, 462 U.S. 306 (1983), relied on heavily by petitioners (Pet. i, 11-13), is completely inapposite. In *Haring*, the Court held that a criminal defendant's plea of guilty (and consequent failure to challenge the legality of a search) did not collaterally estop him from maintaining a subsequent action for damages under 42 U.S.C. 1983 based on the alleged unconstitutionality of the search under the Fourth Amendment. *Haring* has nothing to do with mootness, and surely does not stand for the proposition that Fourth Amendment challenges are somehow exempt from the Article III requirement of a live controversy.[7]

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[5]The conflict among the circuits noted by petitioners (Pet. 15-16) with respect to whether compliance with a subpoena renders moot a challenge to the subpoena is irrelevant to the instant case, where petitioners failed to challenge any Commission subpoena.

[6]Petitioners' reliance (Pet. 15) on *SEC* v. *Sloan*, 436 U.S. 103 (1978), is decidedly misplaced. In that case, the Commission had "tacked" consecutive ten-day suspension orders, thus continuously suspending trading in a company's stock. Although at the time of review no suspension order was in effect, the Court held that the challenge was not moot because each order's duration was too short to allow full judicial review and because there was a reasonable expectation that the same party would be subject to the same action in the future (*id.* at 109). Neither factor is present here.

[7]In any event, petitioners' constitutional claim (see Pet. 17-20) is meritless. Petitioners erroneously equate the Commission's formal order with a search or with a warrant or subpoena that itself compels disclosure of information or production of documents. In fact, a formal order merely authorizes the Commission staff to issue subpoenas during an investigation; these subpoenas, much less formal orders, cannot compel a person to do anything because they are not self-enforcing

2. Petitioners' argument (Pet. 20-24) that the district court abused its discretion in denying their Rule 60(b)(6) motion is without merit. The gravamen of that motion was that petitioners' trial counsel had been grossly negligent in not objecting to the admission of "tainted evidence" at the trial of the Commission's enforcement action. The conclusion of both courts below that the failure to object was a calculated tactical choice is supported by petitioner Blinder's own affidavit in support of the Rule 60(b)(6) motion, which averred (paras. 9, 19) that the failure to challenge evidence at trial was a considered decision resulting from counsel's conclusion as to the proper means for challenging the investigation. Petitioners' claim that they are entitled to the extraordinary remedy of relief from judgment—a judgment whose merits this Court has already declined to review (see page 2, *supra*)—obviously does not warrant further attention.

Petitioners' belated and unsupported claim of a conflict of interest on the part of their counsel fails to demonstrate any error in the denial of their Rule 60(b)(6) motion. Petitioners assert (Pet. 24 & n.50) that the conflict surfaced when one of their trial counsel joined another brokerage firm more than two years after the trial at which the "tainted evidence" was introduced. Petitioners failed to raise this conflict claim in the district court in their Rule 60(b)(6) motion or in their opening brief on appeal, mentioning it for the first time only in a footnote in their reply brief on appeal

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(*Jerry T. O'Brien, Inc.*, slip op. 1-2 nn.1, 5). In a subpoena enforcement action, the subpoenaed party may object on any appropriate ground. See generally *SEC* v. *Arthur Young & Co.*, 584 F.2d 1018 (D.C. Cir. 1978), cert. denied, 439 U.S. 1071 (1979). Thus, contrary to petitioners' ill-founded claim (Pet. 19-20), a formal order does not give the Commission "*carte blanche* to subpoena documents and coerce testimony." The subpoena enforcement procedure guarantees that the Commission's requests for documents and testimony are subject to judicial review and to full constitutional protections.

filed on August 30, 1984. No evidence has ever been presented below in support of their argument, which was not made until one year after their former counsel's change in position. During that year, petitioners filed five submissions attacking the injunction, not one of which referred to the asserted conflict. Moreover, contrary to petitioners' suggestion (Pet. 11), the attorney in question did not present oral argument on behalf of petitioners on their appeal from the injunction. There is no basis for further review of petitioners' latest effort at avoiding the consequences of their wrongdoing. As the Court stated in *Ackermann* v. *United States*, 340 U.S. 193, 198 (1950), "[t]here must be an end to litigation someday."[8]

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[8]Petitioners' attempt to endow their claim with a constitutional aura is, in any event, utterly without foundation. Petitioners had no Sixth Amendment right to effective assistance of counsel because the Commission's enforcement action was civil, not criminal. See, *e.g.*, *SEC* v. *C.M. Joiner Leasing Corp.*, 320 U.S. 344, 355 (1943); L. Loss, *Fundamentals of Securities Regulation* 801 & n.7 (1983); see also *Steadman* v. *SEC*, 450 U.S. 91 (1981). See generally *Mekdeci* v. *Merrell National Laboratories*, 711 F.2d 1510, 1522-1523 (11th Cir. 1983); *Watson* v. *Moss*, 619 F.2d 775, 776 (8th Cir. 1980); *Ramirez* v. *INS*, 550 F.2d 560, 563 (9th Cir. 1977). Nor does the adequacy of petitioners' privately retained counsel implicate due process concerns, for their attorney's conduct cannot be laid at the door of the government. See *Wainwright* v. *Torna*, 455 U.S. 586, 588 n.4 (1982) (deprivation was caused by counsel, not by the state); cf. *Polk County* v. *Dodson*, 454 U.S. 312, 317-325 (1981) (public defender whose salary is paid by the state does not act "under color of state law"). The Constitution obviously does not require that civil judgments be subject to attack on grounds of inadequacy of representation by privately retained counsel. See generally *Link* v. *Wabash R.R.*, 370 U.S. 626, 633-634 (1962).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1985

DOJ-1985-05